

This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

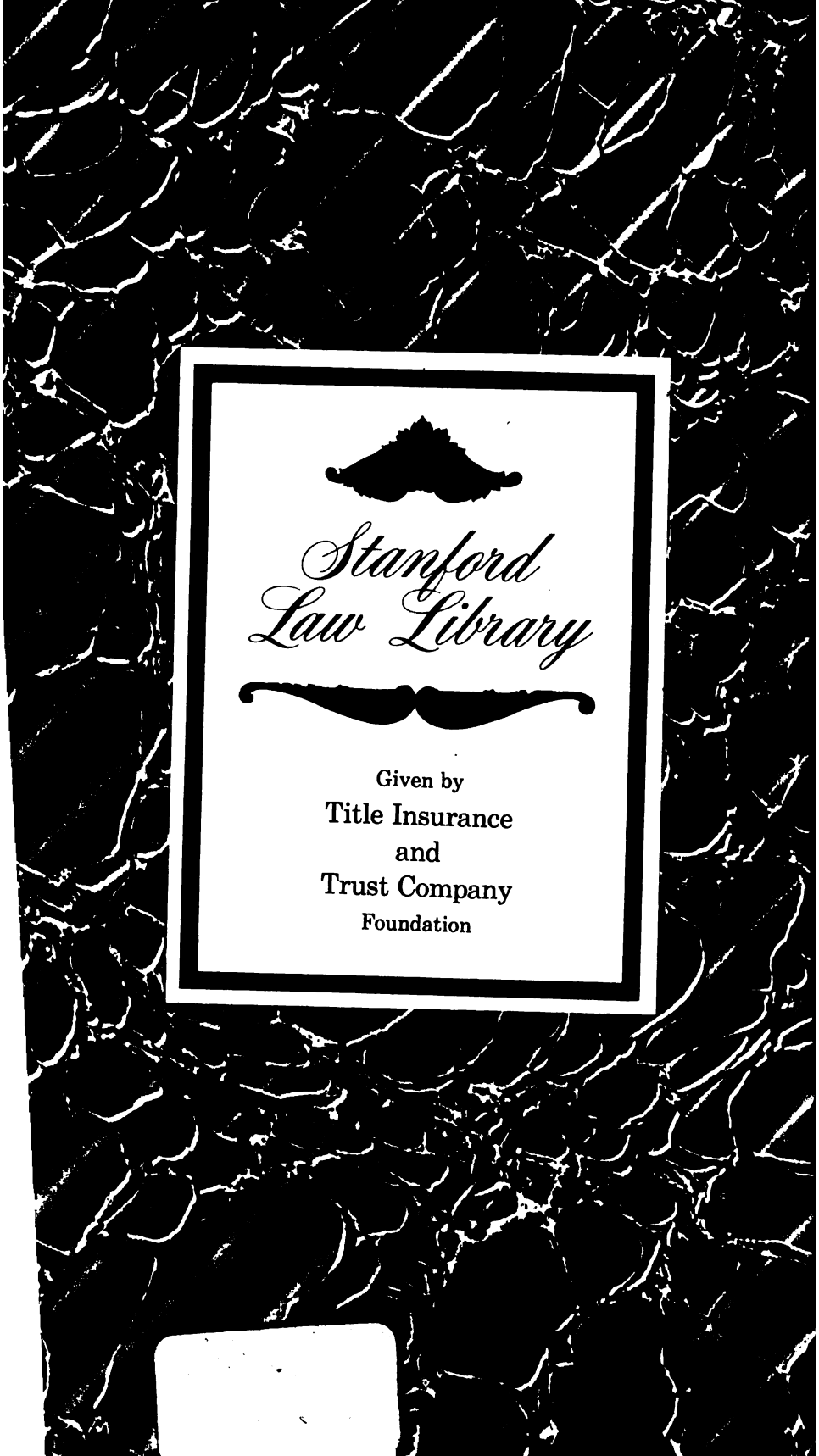
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`


Stanford
Law Library
Given by
Title Insurance
and
Trust Company
Foundation



DL
ACT

A

TREATISE

ON

THE LAW

OF

MORTGAGE.

BY

RICHARD HOLMES COOTE,

OF LINCOLN'S INN, ESQ. BARRISTER AT LAW.

London:

PRINTED FOR

JOSEPH BUTTERWORTH AND SON, LAW-BOOKSELLERS,

No. 43, FLEET STREET;

AND J. COOKE, ORMOND QUAY, DUBLIN.

1821.

2nd Edition 1837.

G. WOODFALL, PRINTER, ANGEL COURT, SKINNER STREET, LONDON.

TO THE

RIGHT HONORABLE

JOHN, LORD ELDON,

Lord High Chancellor of Great Britain,

THIS WORK

IS

(WITH HIS LORDSHIP'S PERMISSION)

MOST RESPECTFULLY INSCRIBED.

CONTENTS.

Book I.

Chap. I. Introductory Chapter.
II. Of Mortgages at Common Law.
III. — Mortgage, with Equity of Redemption.
IV. — the Nature of an Equity of Redemption, its Rights and Incidents.
V. — Statutes Merchant, Statutes Staple, Recognizances and Elegit.

Book II.

Chap. I. Of the Subjects of Mortgage.
II. — Mortgages of Freeholds.
III. ———— Copyholds.
IV. ———— Leaseholds.
V. ———— with Power of Sale.
VI. ———— under Trust Terms, to raise Portions and Maintenance.
VII. ———— by Executors, by Trustees for Sale and for Payment of Debts, and under Powers of charging.
VIII. Of Equitable Mortgage by Deposit of Title Deeds.
IX. — Welch Mortgages.
X. — Mortgages by Tenants in tail, and by defective Conveyance.

Book II.

CHAP. XI. Of Mortgages of Advowsons, Church Livings, Rectories impropriate, and Tythes.
XII. — Mortgages of the Equity of Redemption.
XIII. — Equitable Lien on Landed Estate.
XIV. — Mortgages of Chattels Personal.
XV. ———— Bills of Lading.
XVI. Mortgages of Ships and Freight.
XVII. ———— Stock.
XVIII. On Liens in general.
XIX. Of Assignments of Mortgage.

Book III.

CHAP. I. Of the relative Estates of Mortgagor and Mortgagee.
II. ——— Privileges attending the Estate of the Mortgagor.
III. ——— Restrictions and Disabilities annexed to the Estate of the Mortgagor.
IV. ——— Privileges annexed to the Estate of the Mortgagee.
V. ——— Restrictions and Disabilities annexed to the Estate of the Mortgagee.

A TREATISE ON THE LAW OF MORTGAGE.

BOOK THE FIRST.

Introductory Chapter.

A MORTGAGE may be defined to be (*a*) *a debt by specialty*, secured by a pledge of lands, of which the legal ownership is vested in the creditor, but of which, in equity, the debtor and those claiming under him remain the actual owners, until debarred by judicial sentence or their own laches. It is a security founded on the common law, and perfected by a judicious and wise application of the principles of redemption of the civil law. An inquiry into its nature and practice, will lead us to consider the origin and historical deduction of mortgages; their adoption by the common law, and the establishment of the equitable right of redemption. We shall be then led to inquire into the nature of an equity of redemption, its incidents and qualities, and of the

(*a*) 2 Atk. 486.

division of the respective interests of the mortgagee and mortgagor in the land in pledge, into legal and equitable estates, and the establishment in equity of an actual ownership in the mortgagor, susceptible of the like limitations and modifications of interest as the land itself. It may then become necessary to call our consideration to certain compulsory modes, by which land may become a security for debt by statutory enactments, and we shall afterwards proceed to inquire into the different subjects and modes of mortgage, in which latter inquiry we shall find a species of equitable mortgage by deposit of title-deeds, which, from its present extensive application, will require much of our consideration. Our subject will subsequently lead us to consider the rights of parties entitled to the equity of redemption, the priority of incumbrances, of tacking, and the doctrine of notice as applied to mortgages. And we shall conclude with a consideration by what estate the mortgage debt must be discharged, of foreclosure, and of the several cases and authorities relating to devises of mortgaged lands, whether by the mortgagor or mortgagee.

Preceding writers have traced high the origin of mortgages. Pledges or pawns were probably known to the earliest nations (*a*). As soon as men recognize the rights of property, their necessities will suggest the idea of pledging that property, as the ready means of supplying their wants without departing

(*a*) Mr. Ellis observes in his Journal of the late Embassy to China, page 157, that pawnbrokers' shops are as numerous in Chinese cities as in London.

with their absolute ownership. Their immediate personal property (*a*) may be the first objects of pledge; afterwards articles of merchandize and barter; and ultimately land.

Mortgages of a peculiar nature are said to have been known amongst the Jews, from whom, according to the opinions of some writers, the notion of mortgaging lands had origin. Land could not, according to the Jewish law, be aliened beyond the next jubilee, which occurred every fifty years. The original owner might, at any time during the fifty years, redeem on payment of the value of the land, to be computed from the time of redemption to the next jubilee, and, at all events, when the day of jubilee arrived, the lands returned to the owner, discharged of the debt, and their loans were regulated accordingly.

From the Jews, the idea of mortgages is supposed to have passed to the Greeks and Romans. Pledges and pawns were well known to the Roman law. The Roman hypotheca closely corresponds with our idea of a mortgage. The subject in pledge was retained by the debtor, and the creditor was, in default of payment, driven to his actio hypothecaria to obtain possession, and at any time before sentence the debtor might redeem (*b*). By that law, the debt was the principal, the security an incident, and when the one ceased, the other ceased also, and until sen-

(*a*) Deuteronomy, cap. 24. (*b*) Bac. Ab. vol. v. 2.

tence, the ownership of the debtor was not displaced.

Doubts are entertained whether mortgages were known to the Anglo-Saxons. We are in a great degree ignorant of the nature of their law of landed property. The most profound writers are at variance (*a*); the one side asserting the law of feuds or tenures to have been acknowledged; the other that it was not. But it seems to be admitted, a right of free alienation of property existed, which implies the right of mortgage or conditional sale; and whether the feudal law was recognized or not, it is manifest that it was not admitted with the burthensome restrictions afterwards introduced by the Norman feudists(*b*), and which we may conclude to have been those generally submitted to by the Normans themselves, and other continental nations then acknowledging the feudal law. It is not highly improbable, but that the Saxons might on their conquest have found traces of the civil law introduced by the Romans, during the long period of their possession, and might have engrafted them on the principles of the feudal law as then acknowledged by themselves, and which had not then arrived at the full maturity it subsequently attained.

After the Norman conquest, mortgages must, it should seem, have been for a time suspended. In the 20th year of William's reign, and on the completion of

(*a*) Wright's Tenures, 47.

(*b*) Somn. Treat. Gavel. 87. Spel. Treat. of Feuds. 21.

Domesday-book, he summoned a meeting of all the principal landholders in London and Salisbury, and accepted from them a surrender of their lands, and regranted them on performance of homage and the oath of fealty. The mesne lords, on their subinfeudations, also demanded homage and fealty, and it was held the bond of allegiance was mutual, each being bound to defend and protect the other. From this flowed the doctrine that the tenant could not transfer his feud without his lord's consent, nor the lord his seignory without his tenant's consent, although the tenants (even of the crown it should seem) might grant subinfeudations (*i. e.* to hold of themselves) without licence. It was further held, the tenant could not subject his lands to his debts by execution of law, for if he could, he might have effected that circuitously, which he could not by direct means have accomplished. Nor, if the lands came to him by descent, could he alien them without the consent of the next collateral heir (*a*). By these restraints on alienation, mortgages of land must have been nearly extinguished (*b*).

A further considerable obstacle to mortgages arose and long continued from the prejudice of the times; for in analogy to the Jewish law (*c*), which forbade profit to be made on the loan of money from Jew to Jew, but not so on a loan from a Jew to a stranger,

(*a*) Wright's Tenures, 168.

(*b*) Feudalia, invito Domino, aut agnatis, non recte subjiciuntur Hypothecæ, quamvis Fructus posse esse, receptum est. Corvin. 268.

(*c*) Deut. cap. 23.

it was held to be usury for Christians to lend money at interest(*a*), and (in case on inquest after death it was found that a man had died an usurer) the offence was punishable by forfeiture of his lands, goods, and chattels (*b*). The consequence was, that the Jews became the great money-lenders of Europe; and in compliance with the subsisting prejudice, the common law of England held, that if lands were enfeoffed to the creditor, and the rents and profits were *ad interim* received by him, and not applied in reduction of the principal of his debt, it was a species of usury which, although not prohibited by the king's court, was punishable by the forfeiture of the lands and chattels of the creditor, if he died possessed of the pledge. And this, according to Glanville (*c*), was the original meaning of the term *mortuum vadium*, or mortgage, and not the meaning subsequently attached to the word by Littleton and others, as hereafter explained.

The improving spirit of the age struggled hard against the fetters on alienation, and at length the statute of *Quia Emptores Terrarum* (*d*), passed in the reign of a monarch deservedly stiled the English Justinian, gave a general licence of free alienation to all, except the immediate tenants of the crown, at

(*a*) 3 Inst. 88. Glanville, lib. 7. cap. 16.

(*b*) When our old writers speak of an usurer, we must understand one who lent money at interest. It was not until the 37 of Hen. 8. cap. 9. that loans at interest were declared legal, if not exceeding 10*l. per cent.*

(*c*) Glanville, de Leg. lib. 10. cap. 6. cap. 8. (*d*) 18 Edw. 1.

the same time that it abolished the power of subinfeudation; thus at once simplifying the tenure, and giving freedom to the alienation of the land of the realm.

On the removal of the restrictions, which impeded the circulation of landed property, mortgages became general. Of these we shall treat in the following chapters.

Fines on alienation by tenants *in capite* were not abolished until the 12 Car. 2. cap. 24. put an end to the remaining feudal burthens.

CHAPTER II.

Of Mortgages at Common Law.

THE common law recognized two kinds of landed security, viz. *vivum vadium* and *mortuum vadium*. The *vivum vadium* and also the *mortuum vadium* (according to Glanville), as at first known, were determinable or base fees, with a right of reverter in the feoffor and his heirs, on the payment of a given sum. The *mortuum vadium*, or mortgage ultimately known at the common law, was an absolute fee, with a condition annexed, making void the feoffment on payment of a given sum, which the common law allowed, if reserved to the feoffor or his heirs. The difference between the estates was striking. In the first instances, the creditor took an estate, which, as soon as his debt was satisfied, *ipso facto* ceased, and the feoffor might re-enter and maintain ejectment; in the latter instance the feoffee took the whole estate, subject to be defeated, but which, on the non-fulfilment of a certain engagement, became his own by an indefeasible title. In the first case the defeasibility was an inherent quality of the estate; in the other case the determination was collateral to the estate.

The *vivum vadium* consisted of a feoffment to the creditor and his heirs, until out of the rents and profits he had satisfied himself his debt; the creditor took actual possession of the estate, and received the rents, and applied them from time to time in liquidation of the debt. When it was satisfied, the debtor might, as

before observed, re-enter and maintain ejectment; and it is said to have been called *vivum vadium*, because neither debt nor estate was lost.

This mode of security was probably never general: it is ill adapted to the purpose of a pledge, whose object is the repayment of the loan in one entire sum at a given time, and not a repayment by small instalments, which in fact is eating out the debt piecemeal; and it seems now to have entirely ceased. A security in land, bearing a remote resemblance to the *vivum vadium*, may be considered as subsisting under the appellation of Welch mortgage; but there is this distinction between the securities, viz. that in the *vivum vadium*, the rents were applied in satisfaction of the principal, and in Welch mortgages they are received in satisfaction of the interest, while the principal remains undiminished. In one respect they agree, the estate is never forfeited. The Welch mortgage seems in fact pretty closely to resemble the ancient *mortuum vadium*.

The *mortuum vadium*, or mortgage, is mentioned by Littleton, Coke, and others, as so called, because on breach of condition the estate was rendered indefeasible in the mortgagee, and absolutely lost to the mortgagor. In this light it is placed by Lord Coke, in contradistinction to the *vivum vadium*, and such seems to be the opinion generally adopted. But Glanville, as has been observed (*a*), gives a different meaning to the origin of the term. He says, " Mor-

(*a*) Lib. 10. cap. 6.

tuum vadium dicitur illud cujus fructus vel redditus interim percepti in nullo se acquietant;" and applies it to the before-mentioned species of usury at common law, viz. a feoffment to the creditor and his heirs, to be held by him until his debtor paid him a given sum, and until which he received the rents without account, so that the estate was unprofitable or dead to him in the mean time; and the exposition given by Glanville seems the more sound, as it was rendered at a very early period of our history, and while yet the fetters on alienation were unremoved. We may therefore consider the *vivum vadium* to have implied a security, by which the rents of land were from time to time applied in reduction of the principal of the debt; and the *mortuum vadium* to have originally implied a security, by which, until payment of a given sum, the rents of land were *ad interim* lost to the owner, and received by the creditor and unaccounted for, so that the debt remained undiminished, which was at common law, as before remarked, in the event of the creditor dying possessed of the pledge, punishable as usury; and it must be observed, there was the like advantage, in one respect, to the debtor in this form of mortgage, as in the *vivum vadium*, viz. that the estate was never lost.

There is no trace of the period when this mode of mortgage fell into disuse. In its stead arose the *mortuum vadium*, or mortgage, afterwards so well known at common law, and thus described by Littleton (*a*). "Item; if a feoffment be made upon such

(*a*) Sec. 332.

condition, that if the feoffor pay to the feoffee at a certain day, &c. forty pounds of money, that then the feoffor may re-enter, &c. In this case the feoffee is called tenant in mortgage, which is as much as to say in French, *come mortgage*, and in Latin, *mortuum vadium*. And it seemeth that the cause why it is called mortgage is, for that it is doubtful whether the feoffor will pay, at the day limited, such sum or not; and if he doth not pay, then the land which is put in pledge, upon condition for the payment of the money, is taken from him for ever, and so dead to him upon condition, &c.; and if he doth pay the money, then the pledge is dead as to the tenant, &c."

It is somewhat singular that Littleton should not refer to the explanation of the term as rendered by Glanville; and we may conclude that the original *mortuum vadium* had by this time totally fallen into disuse, and become obsolete. The mortgage described by Littleton was strictly an estate upon condition, that is, a feoffment of the land was made to the creditor, with a condition in the deed of feoffment or in a deed of defeazance executed *at the same time* (for the common law does not allow a feoffment to be defeazanced by matter subsequent), by which it was provided, that on payment by the mortgagor or feoffor of a given sum at a time and place certain, it should be lawful for him to re-enter. Immediately on the livery made, the mortgagee or feoffee became the legal owner of the land, and in him the legal estate instantly vested, subject to the condition (*a*).

(*a*) In Bacon's Abridgment, vol. v. page 15, it is stated, that "the mortgagor before forfeiture, and whilst it remains uncertain

If the condition was performed, the feoffor re-entered and was in of his old estate, paramount all the charges and incumbrances of the feoffee, whether in the *Per* or in the *Post*, or in other words, above all persons, whether claiming through the feoffee, as heir, widow, or purchaser, or paramount, or collaterally to the feoffee, as the lord by escheat and the husband by curtesy. If the condition was broken, the feoffee's estate was absolute and his estate was indefeasible, and all the legal consequences followed as though he had been absolute owner from the time of the feoffment. But until breach of condition, possession was not in general given, which was a further distinction between this mode of mortgage and the *vivum vadium* and old *mortuum vadium*. And in order to protect the mortgagor from the eviction of the mortgagee, to which he was become liable, a proviso was inserted, declaring, that until breach of condition, the mortgagor might hold the estate; and on the other hand, the mortgagor engaged, that in such event, he would do all lawful acts for further assurance.

Although the common law did not favor conditions, but required strict performance of them (*a*), yet it was in certain cases satisfied with the performance of the intent of the condition (*b*), though not performed in words; and although a difference

whether he will perform the condition at the time limited or not, hath the legal estate in him." This is a mistake; the legal estate instantly vests in the mortgagee, subject to be defeated on performance of the condition by the mortgagor.

(*a*) Co. Litt. 205. a. (*b*) Shep. Touch. 139.

was taken (*a*) between conditions to preserve and conditions to destroy an estate, the former being allowed to be performed as near the condition as could be, and the latter being *strictissimi juris*, yet conditions in mortgages, the performance of which, in fact, destroyed the estate of the mortgagee, were favored in the eye of the law, and rather considered as belonging to the class of conditions for preserving estates.

The general rules at common law regulating the performance of conditions in mortgage, were as follow:

If time and place were appointed for payment of the money, tender must be made accordingly; but if no place were appointed, then (the money being a sum in gross, and collateral to the title to the land,) the mortgagor was bound to seek the mortgagee and tender him the money personally, if within the realm, and it was not sufficient to tender it on the land (*b*).

If no time were appointed, the mortgagor had his whole life for payment of it (*c*).

If no time were appointed, and the condition were, if the mortgagor pay 10*l.* to the mortgagee, (without mentioning heirs, &c.) and the mortgagor died without paying it, the condition was broken

(*a*) Co. Litt. 206. a. (*b*) Ibid. 210. b.
(*c*) Ibid. 208. b.

and the estate absolute (*a*). But if a time had been appointed, and the condition had been that the mortgagor (without more) should pay to the mortgagee 10*l.*, and the mortgagor died before the day (*b*), then his heir, executor, or administrator, or the guardian of the heir, might tender the money at the time, and save the condition.

If the words of the condition were for payment unto the feoffee or his heirs (*c*), the money could not be paid to the executor or the assign; if "to heirs or assigns," and the mortgagee transferred the mortgage to another, it might be paid to the first or second feoffee (*d*); or if the first feoffee was dead, to his heirs, but not to his executors (*e*), for the law will never seek an assign in law, where there is one in fact (*f*); if "to heirs, executors, or assigns," it might be paid to either (*g*).

If the condition was for payment by the mortgagor *and* I. S. (*h*), payment by I. S. alone, after the death of the mortgagor, was good; but not during his life.

The mortgagor might tender the money on the appointed day, at any convenient time in which the money might be counted before sun-set (*i*). But a

(*a*) Litt. sec. 337. (*b*) Ibid. 334.
(*c*) 5 Co. 96. Co. Litt. 210. (*d*) Ibid.
(*e*) 5 Co. 97. Dyer, 180. (*f*) Co. Litt. 210.
(*g*) Ibid. (*h*) Shep. Touch. 141.
(*i*) Wade's case, 5 Co. 115.

tender made at any other time in the day was good, and, if refused, he need not re-tender it by a convenient time before the last instant, and he might pay it tied up in bags, and it was at the peril of the mortgagee to miscount it (*a*). And even if part of the money were counterfeit coin, and the mortgagee accepted it, it was a good performance (*b*).

It may be worth inquiry, whether a tender in Bank-notes in the present day would save the condition at law. The legislature has enacted, that on tender of Bank-notes in satisfaction of a debt, and refusal by the creditor, the debtor shall not be held to special bail (*c*). The creditor may however proceed against him by action at law. And although the debtor may, on action brought, pay the money into court in Bank-notes, and thus stop the course of the action (*d*); yet he is liable to costs up to that time. It should therefore seem, that a tender in Bank-notes, if objected to by the creditor, and unless specially provided for in the condition, (which is never done,) is not such a tender as at law would save the condition (*e*).

It was also held, that if an account were stated between the parties, and the balance paid (*f*), or if a new security were taken by bond or statute (*g*), it was a good performance. "And so in most cases,

(*a*) Wade's Case, 5 Co. 115. (*b*) Ibid.
(*c*) 37 Geo. 3. cap. 91. sec. 8. (*d*) 52 Geo. 3. c. 50.
(*e*) Shep. Touch. 136. (*f*) Co. Litt. 213.
(*g*) Ibid. 212.

where by a condition a thing is to be done one way, and to be done to the party to the condition himself, and not to a stranger, and he doth accept it another way, this is a good performance of the condition, *volenti non fit injuria* (*a*)."

The law was stricter when the condition was to be performed to a stranger, or to affect the rights of third persons (*b*). Thus it was adjudged (*c*), that if the mortgagee before transfer or assignment received the money, and returned the whole or part to the mortgagor, it was a good performance of the condition; but where the condition was for payment to the feoffee, his heirs, or assigns (*d*), and the feoffee transferred the mortgage and died, and the mortgagor paid the money to the heir of the first mortgagee who returned part, this was held no good performance to divest the lands from the alienee, or to injure the rights of third persons.

If, at the appointed day, legal tender of the money was made and refused, or no person was ready to receive it, the condition was satisfied, and the mortgagor or his heirs might re-enter (*e*). But here a distinction was taken between a sum by way of gift secured on land, and a debt (*f*). The former was in such case absolutely lost, but the latter was con-

(*a*) Shep. Touch. 143.

(*b*) 5 Co. 96. Cro. Eliz. 383. Moor, 708. Co. Litt. 209. b.

(*c*) Powell v. Bartholomew, Mich. 40 and 41. Eliz. B. R.

(*d*) Goodall's case, 5 Co. 96. (*e*) Dyer, 181. Co. Litt. 209.

(*f*) 5 Bac. Ab. 21. Co. Litt. 209. b.

sidered as still subsisting as a personal duty, and might be recovered by action at law.

It must be further remarked, this right of re-entry on performance of the condition, was neither alienable nor devisable, and could be reserved only, as before-mentioned, to the feoffor or his heirs.

Thus mortgages stood at common law, incumbered with the system from which they originated, and attended with ruinous consequences to the unfortunate debtor; and it is difficult to conceive, had the Courts of law been so inclined (which it does seem they were), on what principle they could have proceeded in giving the debtor relief. The forfeiture was complete; the mortgagee, by the default of the mortgagor, had become the absolute owner of the estate; it could not be divested from him without a reconveyance, and there remained no remedy short of an actual legislative enactment, without disturbing the settled land-marks of property (*a*).

(*a*) Notwithstanding the rigour with which the common law punished the breach of the condition, yet it is clear from the concurrent testimony of all our old dramatic writers, the chroniclers of their times, that the law was opposed to the better feelings of the people, and that a considerable degree of obloquy attended those who took advantage of it. Thus in Beaumont and Fletcher:

ALATHE.—Thou hast undone a faithful gentleman,
By taking forfeit of his land.

ALGRIPE.—I do confess. I will henceforth practise repentance.
I will restore *all mortgages*, forswear abominable usury.

The Night Walker, or Little Thief.

Happily a jurisdiction was arising, under which the harshness of the common law might be softened without an actual interference with its principles, and a system might be established at once consistent with the security of the creditor, and with a due regard for the interests of the debtor.

It may under this head be lastly remarked, that at the present day, if the condition be that on payment, &c. the feoffee, &c. shall reconvey or reassign the estate, there, notwithstanding the performance of the condition, an actual reconveyance or reassignment will be necessary.

CHAPTER III.

Of Mortgage, with Equity of Redemption.

It has been already said, that by the civil law the debtor might redeem the estate on payment of his debt at any time before sentence passed. It has been seen how decidedly opposed to this, is the doctrine of forfeiture at common law. The absolute forfeiture of the estate, whatever might be its value, on breach of the condition, was in the eye of equity a flagrant injustice and hardship, although perfectly accordant with the system on which the mortgage itself was grounded. No wonder then that our courts of equity, founded on the principles of the civil law, should, as they increased in power, attempt, by an introduction of those principles, to moderate the severity with which the common law followed the breach of the condition. They did not indeed make the attempt of altering the legal effect of the forfeiture at common law; they could not, as they might have wished, in conformity to the principles of the civil law, declare that the conveyance should, notwithstanding forfeiture committed, cease at any time before sentence of foreclosure, on payment of the mortgage-money; but leaving the forfeiture to its legal consequences, they operated on the conscience of the mortgagee, and acting *in personam* and not *in rem*, they declared it unreasonable that he should retain for his own benefit, what was intended as a mere pledge; and they adjudged that the breach of the con-

dition was in the nature of a penalty, which ought to be relieved against, and that the mortgagor had an equity to redeem on payment of principal, interest, and costs, notwithstanding the forfeiture at law.

Against the introduction of this novelty, the judges of common law strenuously opposed themselves; and though ultimately defeated by the increasing power of equity, they nevertheless in their own courts still adhered to the rigid doctrine of forfeiture, and in the result, the law of mortgage fell almost entirely within the jurisdiction of equity. There is no record of the time when this equity was first granted. In the before mentioned cases of Wade (*a*) and Goodall (*b*), which were decided towards the end of the reign of Queen Elizabeth, the parties do not seem to have entertained the idea of any remedy existing for the mortgagor's relief, if the forfeiture was established at law, although Tothill mentions a case in the 37th year of Elizabeth's reign (*c*), in which the equity was decreed; and it must soon after this time have been generally in practice, for there is a case decided in the first year of Charles the First (*d*), in which the doctrine seems fully admitted. It was a question as to a mortgage term which had been forfeited by non-payment according to the condition; and the Court held, that although the money was not paid at the day, but afterwards; yet the term ought to be void *in equity*, as

(*a*) 5 Co. 115. (*b*) Ibid. 96.
(*c*) Langford v. Barnard, Tothill, 134.
(*d*) Emanuel College v. Evans, 1 Rep. in Chancery, 10.

well as on a legal payment it would have been void at law. In the intermediate reign of King James the First, the Courts of equity became established in power, and the same period may be reasonably assigned as that in which the doctrine of equity of redemption was fully recognised.

No sooner, however, was this equitable principle established, than the cupidity of creditors induced them to attempt its evasion, and it was a bold but necessary decision of equity that the debtor could not, even by the most solemn engagements entered into at the time of the loan, preclude himself from his right to redeem; for in every other instance probably, the rule of law, *modus et conventio vincunt legem*, is allowed to prevail. In truth it required all the firmness and wisdom of the eminent judges who successively presided in the Courts of equity, to prevent this equitable jurisdiction being nullified by the artifice of the parties.

But those Courts, looking always at the intent, and not at the form of things, disregarded all the defences by which the creditor surrounded himself, and laid down as plain and undeviating rules (*a*), that it was inequitable the creditor should obtain a collateral or additional advantage through the necessities of his debtor, beyond the payment of principal, interest, and costs; and they established as principles not to

(*a*) Newcomb v. Bonham, 2 Vent. 364. 1 Vern. 7. 214. 233. Howard v. Harris, 1 Vern. 192. Jason v. Eyre, 2 Ch. Ca. 33.

be departed from, that once a mortgage always a mortgage; that an estate could not at one time be a mortgage, and at another time cease to be so, by one and the same deed; and that a mortgage could no more be irredeemable than a distress irrepleviable; that the law will control even an express agreement of the parties, and, by the same reason, equity will let a man loose from his agreement, and even against his agreement, admit him to redeem a mortgage (*a*); and that whatever clause or covenant there may be in a conveyance, yet if upon the whole it appear to have been the intention of the parties that such conveyance shall only be a mortgage, or pass an estate redeemable, a court of equity will always construe it so (*b*).

Acting on these principles, they decided that no condition could be valid restricting the right of redemption within a given or limited time, as in Kelvington v. Gardiner (*c*), where the right of redemption was attempted to be confined to the lifetime of the mortgagor; and in Newcomb v. Bonham (*d*), where the like attempt was made. And although the decree for redemption made by Lord Chancellor Nottingham in the last-mentioned case was ultimately

(*a*) 1 Vern. 192. *et vide* East India Company v. Atkyns, Comyns, 349, where *arguendo* it is said, equity will relieve, even if the mortgagor take his oath not to redeem.

(*b*) 5 Bac. Ab. 5.

(*c*) Kelvington v. Gardiner, cited, 1 Vern. 192.

(*d*) Newcomb v. Bonham, 1 Vern. 7. *et vide* Jason v. Eyre, *supra*. Price v. Perrie, 2 Freem. 258.

reversed by Lord Keeper North, yet that was done on a principle which will be hereafter explained, and does not at all militate against the general principle above stated.

Nor did the attempt better succeed to confine the right of redemption to a particular line or class of heirs, for where a man having mortgaged his lands (*a*), amongst which were estates, which after marriage had been limited by way of additional jointure to his wife, and the proviso was, if the mortgagor, *or the heirs male of his body*, should pay, &c. then he or they might re-enter; and he covenanted that no one but himself, or the heirs male of his body, should be admitted to redeem. The jointress, after the death of her husband, without issue, filed her bill to redeem, and it was decreed, notwithstanding an attempt made by the mortgagee to support the agreement, on the pretence that he had purchased the estate from the father of the mortgagor, who was tenant for life only, and had afterwards been evicted by the mortgagor as tenant in tail male, and that the intention was, if the mortgagor had no issue male, to make the mortgagee some compensation for his loss; but of which understanding between the parties no proof was adduced.

The report of the above case states, that the Lord Keeper in decreeing redemption, added, he did so the rather, because the defendant had *a covenant* for the repayment of his money, and therefore it was in the

(*a*) Howard v. Harris, 2 Chan. Ca. 147.

power of the mortgagee to have made it a mortgage at any time, which would bring it within another rule hereafter mentioned, viz. that a mortgage cannot be a mortgage on one side only, but must be mutual. It is however clear, that the omission either of a bond or covenant, which are collateral securities, creating a personal obligation on the mortgagor, will make no difference in the right to redeem, for (*a*) every loan implies a debt; and the right to redeem proceeds on the principle before stated, viz. that a creditor shall not obtain an advantage by his security, beyond his principal, interest, and costs. The bond or covenant may tend to explain a transaction, and shew the intention of the parties in a doubtful case to create a mortgage; it may be good matter of evidence; but neither of them is a necessary ingredient in the creation of mortgage; for, to apply the remedy, equity only requires to be satisfied that the conveyance was originally intended as a security for the payment of a sum of money, whatever form the security may take.

Accordingly equity will admit even *parol* evidence to shew the conveyance was intended by way of security only. A case decided by Lord Chancellor Nottingham is one of frequent reference (*b*). A man agreed to lend money on mortgage, and it was proposed, as was formerly practised, that the mortgagor should execute an absolute conveyance, and that there should at the same time be a deed of de-

(*a*) 1 Pr. Wms. 271. 2 Atk. 496.
(*b*) Sir G. Maxwell v. Lady Montacute, Pre. Cha. 526.

feazance from the mortgagee. The mortgagor executed the conveyance, and then the mortgagee refused to execute the defeazance. Lord Nottingham (after the statute of frauds) admitted parol evidence to shew the agreement, and decreed against the mortgagee.

So Lord Hardwicke says (*a*), "Suppose a person who advances money should, after he (the mortgagor) has executed the absolute conveyance, refuse to execute the defeazance, will not this Court relieve against the fraud?" Again, in another case (*b*), he expressly recognizes the same doctrine, and in the subsequent case of Joynes v. Statham (*c*), the Lord Chancellor observed, "Suppose an agreement for a mortgage drawn by the mortgagee, the mortgagor being a marksman, and the mortgagee omit to insert a covenant for redemption, and then brings a bill to foreclose, shall not the mortgagor be at liberty in this Court, upon reading evidence to shew the omission?" So where (*d*) an absolute conveyance is made for a certain sum of money, and the person to whom it is made, instead of entering and receiving the profits, demands interest for his money, and has it paid him, this will be admitted to explain the nature of the conveyance; and if the conveyance be absolute, and a bill be filed to redeem, and the de-

(*a*) Walker v. Walker, 2 Atk. 99. Dixon v. Parker, 2 Ves. 225.

(*b*) Young v. Peachey, 2 Atk. 257.

(*c*) Joynes v. Statham, 3 Atk. 387.

(*d*) Maxwell v. Montacute, *supra*.

fendant swear it was an absolute purchase; nevertheless parol evidence will, it seems, be admissible to shew the contrary (*a*). And an indorsement on the deed of conveyance, signed by the mortgagor only, is evidence to shew the intent (*b*); as is also a note in writing signed by the parties (*c*); and in an instance where an absolute conveyance for 80*l.* was made, and on bill filed to redeem, the defendant by his answer insisted, that it was intended to be an absolute conveyance without proviso and condition for redemption, but admitted it was in trust after payment of the 80*l.* and interest, for the plaintiff's wife and children, but no such trust was declared by writing. The plaintiff insisted, that as the defendant had confessed he was not to have the estate absolutely, and had not proved the trust, he, the plaintiff, was entitled to redeem. The Court, however, decreed the trust for the benefit of the plaintiff's wife and children (*d*).

Nor will the Courts permit the mortgagee to clog the equity of redemption with any bye-agreement (*e*), so as to gain an undue advantage. Thus in a case, in which money was lent on mortgage at 6 *per cent.* and by a separate deed, the mortgagor covenanted to convey to the mortgagee, if he (the mortgagee) thought fit, ground-rents at twenty years' purchase, to the value of 16,000*l.* On bill filed to redeem,

(*a*) Franklyn v. Fern, Barnard. 30. (*b*) Ibid.
(*c*) Clench v. Witherby, Finch Rep. 376.
(*d*) Hampton v. Spencer, 2 Vern. 288.
(*e*) Jennings v. Ward and others, 2 Vern. 520.

on the usual terms of payment of principal, interest, and costs, the defendant insisted on the agreement; but the Master of the Rolls decreed according to the prayer of the bill.

And so careful is equity to protect the debtor against the oppression of his creditor, that it will not allow the mortgagee to enter into a contract with the mortgagor, *at the time of the loan*, for the absolute purchase of the lands for a specific sum, in case of default made in payment of the mortgage-money at the appointed time, justly considering it would throw open a wide door to oppression, and enable the creditor to drive an inequitable and hard bargain with the debtor, who is rarely prepared to discharge his debt at the specific time (*a*).

But we must be careful to distinguish between the last-mentioned rule, and a case with which it may be confounded, viz. an agreement by the mortgagor in case of sale, to give the mortgagee a preference of pre-emption, which if claimed within a reasonable time will be enforced (*b*). And although at first view this may seem to be within the objection raised by equity, viz. that of giving the creditor a collateral advantage over and above his principal and interest, yet on closer inspection it will be found clear of the rule. The option is still left with the mortgagor;

(*a*) Price v. Perrie, 2 Freem. 258. Willett v. Winnell, 1 Vern. 488. Bowen v. Edwards, 1 Rep. in Chan. 222.

(*b*) Orby v. Trigg, 2 Eq. Ca. Ab. 599. 24. 9 Mod. 2.

he may redeem or sell, nor is he tied down to price; all that is stipulated for is, that if he thinks fit to sell, he shall give the mortgagee the refusal. In Willett v. Winnell and Bowen v. Edwards, the sale was compulsory, and the price stipulated.

The rule must be further distinguished from the cases, in which the Courts have considered the agreement not to amount to a mortgage, but to be a *conditional purchase*, and in which instances, the vendor will, it seems, be kept to his contract. Of this class is the case of an agreement for the purchase of the equity of redemption entered into *bonâ fide* and subsequently to a mortgage which was made and concluded without reference to any such agreement, followed by a subsequent agreement between the parties, that the mortgagor may have the estate on payment of principal, interest and costs (*a*); and also the case of a release of the equity of redemption, with a collateral agreement to reconvey on repayment of the purchase-money (*b*). And in this class also is the case of Sabine v. Barrell, *infra*.

A further distinction has been also made in a case, on which the authorities do not seem to be very clear; viz. between mortgages and *defeasible purchases* (as they are called) subject to repurchase within a limited time, where the interest is taken by

(*a*) Cotterell v. Purchase, Ca. Temp. Talbot, 61.

(*b*) Endsworth v. Griffiths, 15 Vin. Ab. 468. Pl. 8. 2 Eq. Ca. Ab. 595. Pl. 6. 5 B. P. C. 184. Bac. Ab. 5. 9.

way of rent-charge, for it is said that in the latter cases the stipulations made between the parties must be strictly adhered to, or the estate of the grantee will become absolute.

The cases on which this doctrine rests are Floyer v. Lavington (*a*), and Mellor v. Lees (*b*).

In the first of these cases, a man in consideration of 800*l.* *granted* to another a rent of 48*l.* in fee, with a condition, that if the grantor should at any time give notice of his intention to pay in the consideration-money by instalments of 100*l.* every six months, and should, pursuant to such notice, pay the said money and interest *at any time during his life*, the grant should be void. There was no covenant to pay the money, and the rate of interest was then 10*l.* per cent, being much above the amount of the annuity. The grantor was dead; the grantee had conveyed the rent-charge to a purchaser, and sixty years had elapsed. A bill was brought by the heir of the grantor to redeem, and it was dismissed. And in the second of these cases, a man mortgaged lands in fee to secure 200*l.* and the mortgagees demised the lands to the mortgagor for 5,000 years, at a yearly rent of 12*l.* for the first three years, and 10*l.* for the residue of the term, with a proviso, that if in the space of three years the 200*l.* was paid with interest, the premises should be re-

(*a*) 1 P. Williams, 268 (*b*) 2 Atk. 494.

conveyed. The money was charity-money directed to be laid out in land, and the rents applied for certain purposes. After forty-eight years, a bill was filed to redeem; a new trustee of the charity resisted on the ground that it was an absolute purchase, and the Master of the Rolls decreed accordingly. On appeal to Lord Chancellor Hardwicke, he said there was a difference between such an agreement as this relating to a rent-charge issuing out of land, and an agreement relating to the land itself. And so likewise the case of creating a rent-charge out of lands and mortgaging a rent-charge was of different considerations. Where, he asked, was the fraud in the present case? the land itself was not parted with; it was merely buying a rent-charge, and it was plainly the intention of the parties, that after the end of three years the interest should be changed into a rent-charge, and be irredeemable.

This point does not seem of late years to have come before the Courts, and it is submitted, that it is safer to consider these cases as decided on the special circumstances attending them, than as establishing a general principle for the decision of other cases.

Some writers (*a*) have also considered, that the general rule before stated; viz. that the mortgagee shall not be allowed to enter into a contract with the mortgagor at the time of the loan for the abso-

(*a*) 5 Bac. Ab. 12. Powell on Mortgage, 4th Ed. 1 Vol. 173.

lute purchase of the land for a specific sum, in case of default on payment of the mortgage-money at the appointed time, does not apply in case the payment of the money advanced and interest be limited to a particular period, and for this doctrine the case of Tasburgh v. Echlin and others (*a*) is advanced as an authority. But it is submitted that this case was determined on circumstances so special, it is scarcely an authority for any subsequent case, and that it is hardly applicable to the matter in question; the circumstances were briefly these:

John Tasburgh was possessed of the residue of a beneficial term of 116 years in lands in Ireland, under a grant from the crown, at a certain rent. Sir John Eustace was seised of the reversion by a subsequent grant. In May, 1681, Eustace, in consideration of 200*l.*, conveyed the reversion to a trustee for Tasburgh, with a proviso for redemption on payment of 200*l.* and interest within five years, and with a declaration that if the money was not paid in that time, the estate of the trustee should be absolute and indefeasible, and Eustace should be for ever debarred from all right and relief in equity, and Eustace thereby (in default of payment) released to the trustee all his right to redeem. There was no covenant for payment of the mortgage-money. Neither principal or interest was paid within the five years, and Tasburgh having no remedy at law by reason of the security being reversionary, filed his bill in Chancery in Ireland in 1687,

(*a*) Tasburgh v. Echlin and others, 2 B. P. C. 265.

in the name of his trustee, for a foreclosure. Eustace having stood out all process of contempt to a sequestration, appeared by his clerk in May, 1688, and his answer was to be taken by commission in England, and it was ordered that if the same was not returned by the 22d of June following, the cause should be set down to be heard, and the bill taken *pro confesso*. A further time was afterwards given him, and no answer being put in, an order for foreclosure was made, unless principal, interest and costs were paid before the 11th of December, 1689. The money was not paid, and Eustace returned to Ireland and died without issue, having acquiesced for eighteen years under the decree; but the order for foreclosure was never made absolute. Tasburgh died in 1691, and Henry Tasburgh entered as his heir at law, and on the 24th of August, 1722, demised the premises to Macnamara for thirty-one years, at a yearly rent of 250*l*. In September, 1723, the co-heiresses of Eustace filed their bill in Ireland, suggesting surprise, fraud and imposition in obtaining the decree of foreclosure, and praying the same might be reversed, and it was decreed. From this there was an appeal, and the decree of reversal was reversed.

It is submitted that it is difficult to conceive a case can be decided on grounds less favourable than the preceding, for establishing an exception so extensive as that contended for, to the general principle in question; an exception, too, which would go far to introduce the very evil against which equity has been so careful to guard; and it is conceived,

that notwithstanding the case of Tasburgh v. Echlin, the general principle remains unshaken (*a*).

The same beneficial principle which operates in favour of the mortgagor, will operate also in favour of his creditors; as (*b*) where a man having made several mortgages of his land, the first mortgagee filed his bill of foreclosure against the mortgagor and the other creditors; a decree *nisi* was obtained, and, to save the estate, one of the creditors and defendants, with the consent of the other creditors, redeemed, upon an understanding between them that the other creditors should redeem him by a given day. The money was not paid, and after twenty years' possession and considerable sums laid out in improvements, redemption was decreed, and the defendant was allowed only necessary repairs and lasting improvements.

It has been already mentioned (*c*), that it is held a mortgage cannot be a mortgage on one side only; it must be mutual (*d*); that is, if it be a mortgage with one party, it must be a mortgage with both. The reverse of this was formerly attempted to be established; viz. that it must be a mortgage with both or with neither, so that it was argued (*e*) that none could come to redeem, if the mortgagee could not

(*a*) *Sed vide* Powell on Mortgages, 4 Ed. 1 Vol. 183.

(*b*) Exton v. Greaves, 1 Vern. 138. (*c*) Ante page 24.

(*d*) Howard v. Harris, *supra*.

(*e*) Coplestone v. Boxwell, 1 Ch. Ca. 1. White v. Ewer, 2 Vent. 340.

compel the payment of the mortgage-money; but it is submitted the former is the true principle. The mutuality, however, need not run *quatuor pedibus;* the rule only requires that it shall not be competent to one party alone to consider it a mortgage. In other respects the rights of the parties may be different, for it is in every day's practice, that one party may not be able to foreclose at a time when the other may redeem, as is in the instance cited in Talbot v. Braddyl (*a*). "If I lend 100*l.* upon a mortgage, with a proviso to redeem on payment of 112*l.* at the end of two years, there one side cannot foreclose till the end of two years; but if the mortgagor come at the end of the first year and offer to pay the 112*l.* he shall be admitted to the redemption."

And upon this principle the case of Talbot v. Braddyl was decided. Certain lands, part in possession and part out on lease for lives, were, in the year 1657, in consideration of 320*l.* demised to Braddyl for 99 years, at 5*s.* rent reserved, and possession was immediately delivered: there was a proviso, that on payment of 380*l.* in the year 1688, the estate should be redeemed. The land at the time of the mortgage was worth about 15*l.* a-year; the lives fell in, and it became worth 45*l.* a-year. The plaintiff filed his bill to redeem, and Lord Keeper North decreed accordingly, notwithstanding the time specified had not yet arrived, and ordered an account of profits *ab origine* (*b*). It must, however, be ob-

(*a*) 1 Vern. 395. (*b*) 1 Vern. 183.

served, that a mortgagor cannot pay off the mortgage debt at any other than the time stipulated, without giving six previous months' notice, according to the rule of equity hereafter mentioned.

The preceding authorities shew with what jealousy equity has looked on every attempt made to counteract or oppose its interference in behalf of the mortgagor; but its object being to protect him at a time when his necessities may have placed him at the mercy of the mortgagee, *cessante causâ cessat etiam lex*, and therefore the general rule of equity before stated, will admit of a very considerable exception in cases in which there is evidence of intention in the nature of the transaction, that provision was intended to be made by the mortgagor for some branch of his family, or that the mortgage was intended by him in the nature of a family settlement. Thus (*a*) where a man mortgaged lands to his relation in fee, the right to redeem was confined to the mortgagor during his life, and he not having redeemed in his life-time, his heir filed his bill to redeem, and it was decreed on the principle already stated, viz. that the right to redeem cannot be restricted to a given time; but it being in proof that the mortgagor had a kindness for the mortgagee and intended him the land, and that the claim of redemption was inserted only upon the account that the mortgagor (being a bachelor) might marry and have issue, and that his full

(*a*) Newcomb v. Bonham, *supra*.

intent was if he died without issue, the mortgagee should have the estate without redemption, and that the mortgage-money was really the full value at the time of the mortgage, being a reversion on two lives, which had since fallen in, Lord Keeper North, upon a demurrer to a bill of review, was inclined to reverse the decree; and it was at length agreed the cause should be heard *de integro*, which was accordingly done before the Lord Keeper, when he dismissed the bill. The like doctrine governed a case (*a*), in which a man, on his marriage, surrendered his copyholds to the use of himself and wife, in special tail, with remainder to his wife in fee, upon condition that if he paid 50*l.* to his wife's daughter on a given day, the surrender should be void. The money was not paid. The husband died without issue: the wife sold the estate; and the heir of the husband filed his bill to redeem. The defendant pleaded a purchase for valuable consideration without notice. The court held it to have been the intention of the husband to reserve the option of paying the money, or letting the settlement stand; and allowed the plea (*b*).

It is rather singular that the case of Jason v. Eyres (*c*) was not adjudged as coming within the ex-

(*a*) King v. Bromley, 2 Eq. Ca. Ab. 595.

(*b* *Et vide* Woolston v. Aston, Hard. 511. Hampton v. Spencer, *supra*. Jason v. Eyres, 2 Ch. Ca. 33.

(*c*) Jason v. Eyres, *supra*.

ception we are now considering, for it should seem to have been directly within its principle. Sir Robert Jason being seised of lands subject to a mortgage, entered into a marriage contract, by which it was agreed that the wife's fortune and a certain sum to be advanced by Sir Robert should be paid in reduction of the mortgage, and that for securing the payment of the remainder at the expiration of eighteen months, with interest, in the mean time, half yearly at 6 *per cent.*, the lands should be demised to trustees for 500 years; subject to which the lands were to be settled to Sir Robert for life, remainder to his intended wife for life, remainder to trustees in fee, upon trust, if Sir Robert should pay the remainder of the mortgage-debt and interest within the appointed time, if he should so long live, or otherwise within three years from the date of the conveyance, if he should so long live, and procure the lease to be surrendered, then in trust for Sir Robert and his heirs; but in case failure in payment was made, or if Sir Robert should die before payment and surrender of the term, then in trust for the wife in fee, not only to enable her to pay the debt and free her jointure thereof, but to the end that she might enjoy the inheritance *for the increase of her fortune*, according to an agreement between them. Sir Robert died, and cross bills were filed by the widow and her second husband to have the inheritance, and by the heir to redeem. And redemption was decreed on the principle before stated, that once a mortgage always a mortgage, and that Sir Robert might have redeemed, had he lived beyond the three years. It is submitted that it might have been fairly

contended, that the right of the wife was maintainable on the ground of the transaction being intended by way of settlement or family provision (*a*).

A doubt has been raised (*b*), whether an absolute conveyance can be converted into a mortgage by agreement *subsequent*. A slight consideration of principles will, it should seem, satisfy us on this head.

Equity looks to the substance and not to the form of things; and therefore on the one hand it considers a purchaser, after an agreement for an absolute sale, the actual owner before conveyance; and on the other hand where the agreement is for a mortgage, it considers the mortgagor the actual owner after conveyance. Applying these principles to the point in question, as soon as the agreement for an absolute sale is executed, and the consideration paid, the vendor is in equity a stranger to the estate, and any subsequent transaction between him and the purchaser cannot, it should seem, have the effect of divesting the ownership from the purchaser, and reinvesting it in the original vendor, without the intermediate step of a repurchase by the vendor. There is no greater privity of estate subsisting between

(*a*) In this case *parol* evidence was offered and read on both sides, of which the Court took no notice, but rejected. It will be observed, that in Newcomb v. Bonham, the ultimate decision was expressly founded on *parol* evidence of the mortgagor's intention, and at the present day such evidence would be clearly admissible. Richards v. Sims, Barnard. 90.

(*b*) Powell on Mortgage, 4th Ed. 1 Vol. 156.

them than between any two indifferent persons, and no act has been done to shift the ownership back again. Then if the purchaser contract, on repayment of the consideration-money, with interest, to reconvey the estate, this can be of no more avail in equity, than if A. should contract to sell the estate to B. on payment of a sum of money with interest. If the purchase-money is not paid, A. may rescind his contract.

Upon this principle was decided the case of Sabine v. Barrell (*a*), in which the Lord Keeper said he was satisfied it was not originally a mortgage, but an absolute purchase; and that he thought where there was a clause or proviso for repurchase, the time limited ought to be precisely observed; and it may be thought this was the true principle which decided the before mentioned cases of Cotterell v. Purchase, and Endsworth v. Griffith, and in the case of Coplestone v. Boxwell (*b*), the point was strongly pressed by the counsel, for the defendant; but the case was referred to arbitration.

It may be further remarked, that the circumstance of an agreement to reconvey, although entered into *at the time* of conveyance, is not sufficient to convert the transaction into a mortgage, if there be evidence to rebut the presumption (*c*), and further that an

(*a*) Sabine v. Barrell, 1 Vern. 268.
(*b*) Coplestone v. Boxwell, 1 Ch. Ca. 1. 3 Salk. 241.
(*c*) Sabine v. Barrell, *supra*.

estate redeemable may be rendered irredeemable by evidence of title, as where (*a*) copyholds were surrendered by way of mortgage, and by a second surrender the mortgagor limited them to himself for life, remainder to his wife for life, remainder to the mortgagee in fee. And although the words "subject to the trusts of the former surrender," were added, yet the Court refused redemption, and considered the words to mean, "subject to the preceding life-estates."

It scarcely need be noticed, that the mortgagor cannot under his covenant for further assurance, on default in payment, be called upon to release his equity of redemption, and that he can under such covenant be required to confirm the mortgage only (*b*).

(*a*) Perry v. Marston, 2 B. C. C. 397.

(*b*) Atkins v. Uton, 1 Lord Raym. 36. Comb. 318.

CHAPTER IV.

Of the Nature of an Equity of Redemption, its Rights and Incidents.

THE right or equity of redemption being thus established, it became necessary to determine what was the nature of that right, against whom it would lie, and what were its incidents or qualities.

First, then, of the nature of an equity of redemption.

It has been already shewn, that by the common law, the legal ownership of the land on the execution of the deed of mortgage, was transferred to the mortgagee, subject to be divested on performance of the condition, and that a mere right of re-entry on performance of condition remained in the mortgagor, of which advantage could be taken by him or his heirs alone, and which was neither alienable nor devisable. These doctrines were, it should seem, at first attempted to be applied in equity to the right to redeem after condition broken, without reference to the principles, on which that right was founded, and accordingly in Roscarrick v. Barton (*a*), heard in Chancery the 21st of February, 23 and 24 Car. 2. an equity of redemp-

(*a*) Roscarrick v. Barton, 1 Ch. Ca. 217.

tion was said to be but a mere right; a right to a bill in equity, and not such an inheritance as could be entailed, within the statute *de donis;* and even so late as in the case of Casborne v. Scarfe (*a*), heard before Lord Chancellor Hardwicke in Hilary Vacation, 1737, the like doctrine of the equity being a mere right was advanced and strongly pressed on the Court to rebut the claim of an husband as tenant by the curtesy. But equity adhering to the principle of the civil law, which considered the borrower the owner of the pledge until debarred by judicial sentence, and looking at the substance and not at the form of things (*b*), held the mortgagor, as in the civil law, the real owner of the land until decree of foreclosure, and possessed of it in his ancient and original right, and therefore that great judge of equity, Lord Hardwicke, in Casborne v. Scarfe (*c*), denied the argument, that the equity was but a right, and putting the question on sound principles, declared the equity to be *an estate* in the land, and the person entitled to it the real owner of the land, and the mortgage personal assets.

An equity of redemption then is, in equity, the ancient estate in the land without change of ownership. And it is said by Lord Hale (*d*) to be not merely a trust, but a title in equity, and to be inherent in the land, and binding on all persons, whether in the

(*a*) Casborne v. Scarfe, 1 Atk. 602.
(*b*) Francis's Maxims, Max. 13.
(*c*) *Supra.*
(*d*) Pawlett v. the Attorney General, Hard. 465.

post or otherwise, and something more than a mere trust, which is collateral, and annexed in privity to the estate, and to the person concerning the land, and which is neither *jus in re* nor *jus ad rem* (*a*); and it was also held (*b*) that a trust being the creature of the parties, and for the execution of which, those who created it, could provide, bound those only, who came in in privity of estate, or with notice or without consideration, but not those in the post, as the tenant by curtesy and the lord by escheat, but that an equity of redemption bound all, as well those in the per as in the post or otherwise. This distinction between a trust and equity of redemption has lost much of its importance, since equity has decreed, that all persons, whether in the per or in the post (not being *bonâ fide* purchasers without notice) shall be bound by a trust, excepting the king claiming by attainder, and, perhaps, the lord by escheat or forfeiture. But it is submitted, that if Lord Hale's conception of an equity of redemption be correct, viz. that it is inherent in the land and not as a trust collateral to it, and therefore binding on all persons whether in the post or otherwise, the lord by escheat or forfeiture must be bound by it (*c*), and a further distinction might at first view be considered as subsisting between the estates, inasmuch as it might be argued a *bonâ fide* purchaser without notice might, on this principle, be considered as bound by an equity of re-

(*a*) Treatise on Equity, vol. ii. 7.
(*b*) Ibid. vol. ii. 258. (*c*) Ibid.

demption, although not by a trust. Nor is actual authority wanting to support such a distinction; for, in an early case (*a*), it is said "the Court will relieve a mortgage to the tenth generation, *though the purchaser had no notice,* because it is supposed, he cannot purchase, but it must be derived from the mortgage." But, at the present day, it is conceived, this distinction does not exist, and that a *bonâ fide* purchaser without notice would be alike relieved from an equity of redemption and from a trust (*b*).

Notwithstanding the high ground taken by Lord Hale, when speaking of an equity of redemption, as before noticed, it must be mentioned, that immediately after the establishment of the equity of redemption, the ancient prejudices so far fettered judicial decisions, that it was holden if the lands were conveyed to a mortgagee in fee, they became subject to his legal incumbrances, and to the dower of his wife (*c*), and to prevent the latter, it was usual to convey the lands to two persons and their heirs in joint tenancy; but this misconception was soon remedied by equity as already shewn.

In Pawlett v. the Attorney-General (*d*), the point was mooted, whether the king was subject to an equity

(*a*) Bacon v. Bacon, Tothill, 133.

(*b*) *Et vide infra,* "notice."

(*c*) Nash v. Preston, Cro. Car. 190. 1 Eq. Ca. Ab. 311. Co. Litt. 204. n. 1.

(*d*) Pawlett v. Attorney-General, *supra.*

of redemption on a mortgage in fee. The mortgagee had by his will made a general bequest of his personal estate, and appointed an executor. The legal estate descended on his heir at law, who was attainted of high treason, whereupon the king seised the land; the executor also extended the land under a recognizance which was a collateral security for the mortgage-money. The mortgagor filed his bill against both. Lord Chief Baron Hale on the first hearing seems to have been of opinion, that although, in natural justice, equity of redemption lay against the king, yet he could not be compelled to reconvey; but that an *amoveas manum* could only lie in such case; and on the second hearing he said, that the king being in actual possession, could not be removed in equity by an *amoveas manum* as he might at law. But Baron Atkyns was strongly of opinion the party ought to be relieved against the king, because he was the fountain and head of justice and equity: no further notice is taken of the case. The author feels great difficulty in considering this case a direct authority for the proposition laid down in Mr. Powell's Treatise on Mortgage (*a*), that "redemption of a mortgage may be had against the king;" but no other authority is there cited for it; nor is the author aware that it has received any further sanction. He feels himself, therefore, compelled to leave the question to the judgment of the learned reader.

A corporation, which as well as the king was formerly not considered as subject to the performance of a mere trust, is now subject both to a trust and an

(*a*) Powell on Mortgages, 4th Ed. 1 Vol. 361.

equity of redemption, and it may be broadly laid down, that the equity will lie against every person and body politic or corporate, saving the doubt already mentioned of the want of express authority for the proposition that an equity of redemption will lie against the king.

Next to the rights and incidents of an equity of redemption.

From the principle already stated, that an equity of redemption is the ancient estate without change of ownership, it is manifest its line of devolution must remain unaltered, whether the descent be governed by the general law of the land, or by the *lex loci;* and, therefore, if the land be of gavel kind tenure, the equity of redemption is devisable in like manner, or if it be within the custom of Borough English, the youngest son will be entitled, and so of the like (*a*).

From the same principle it must follow (*b*), that if lands be devised and afterwards mortgaged, the mortgage, whatever be its form, whether in fee, or for years, or as a trust for sale, if confined to the purpose of the security, can be in equity but a revocation *pro tanto;* and so a devise made of the equity of redemption itself must be also valid (*c*), if attended with the like technicalities, as the law requires for a devise of the land. A doubt has been raised (*d*) whether, prior to the breach of condition, when, as has been already explained, the mortgagor has a right of re-entry

(*a*) 2 Ves. 304. (*b*) Thorne v. Thorne, 1 Vern. 182. Hall v. Dunch, 1 Vern. 329. (*c*) Philips v. Hele, 1 Rep. in Ch. 190. (*d*) 2 Ch. Ca. 8.

only, a valid devise of the land can be made; and the ground of objection is, that the benefit of a condition is not devisable. There seems *at law* to be sound reason for the objection; for a right of re-entry, can scarcely be placed on the footing of a *possibility*, accompanied with an interest, as has been attempted by a preceding writer (*a*), and devisable as such; but nevertheless if such a devise could not be maintained *at law*, which, it is apprehended, is the total amount of the question, it would, it is conceived, be good in equity, whether the mortgagor should die before or after breach of the condition. It is not, however, the intention in this place to enter into the doctrine of the devise of lands in mortgage, but to reserve the consideration of it to a subsequent chapter.

Prior to the decision that an equity of redemption was *an estate* in the land, and so long as the notion prevailed, that it was but *a right*, the limitation of it by way of entail or in strict settlement seemed out of the question, and it was considered, that such an entail, if it could subsist, would tend to a perpetuity. But when the equity was declared to be the ancient estate without change of ownership, it became of course subject to all the limitations to which other estates in equity were liable (*b*).

It was once received in equity, that an entail in a trust estate and remainders over might be barred by any mode of assurance whatever, as by bargain and sale, covenant to stand seised, feoffment, and even by

(*a*) See Powell on Mortgages, 4th Ed. 348, who refers to Roe v. Jones, 1 H. Bl. 30. (*b*) Hard. 469.

will (*a*); and in accordance with this doctrine it is said to have been decided that tenant in tail of an equity of redemption might devise it for payment of debts (*b*), and it seems even to have been doubted, whether a common recovery could be suffered of an equitable entail, unless upon a consideration (*c*). But on a question before Lord Chancellor Hardwicke (*d*), whether an equitable remainder on an estate tail was barred by a settlement and will, he decided with great clearness, that the remainder was not barred, and it is now settled, that an equitable entail and remainders are barrable by such mode of assurance only as will bar a legal entail and remainders, viz. by fine or recovery.

In consistency with the anomalous decision of equity, that there shall be a tenancy by the curtesy, but not dower, of a trust estate, decided cases have determined the like of an equity of redemption. The right to tenancy by the curtesy was disputed on the notion already mentioned, that the equity was but a right of which a seisin could not be had by the wife so as to give title to the husband; but Lord Hardwicke in deciding the equity to be an estate, decided also the right to the tenancy by the curtesy (*e*). The chief arguments relied on (*f*) by the widow for right to dower of an equity of redemption, were, first that dower was a right founded on principles of morality and equity, and, secondly, that an equity of redemption was to be distinguished from a mere trust, the latter being the creature of

(*a*) 1 Vern. 14. note. (*b*) Turner v. Gwinn, 1 Vern. 41. 99. (*c*) Goodrick v. Brown, 1 Ch. Ca. 49. (*d*) Kirkham v. Smith, Amb. 518. and see Legat v. Sewell, 2 Vern. 552. (*e*) Casborne v. Scarfe, *supra*. (*f*) Dixon v. Saville, 1 B. C. C. 326.

the parties themselves, who, it might be supposed, had voluntarily relinquished the legal incidents and privileges it wanted; but that the former was the creature of the Court, founded on the principle, that the mortgage was nothing originally more than a pledge, and that the original ownership remained in the mortgagor, subject to the legal title of the mortgagee, so far as such legal title was requisite to the end of his security, and that accordingly the estate of the mortgagee was not treated by equity as any title beyond that extent, and that his beneficial interest, though the mortgage was in fee, was considered only as personal estate (*a*); but the Lords Commissioners considered the point so well settled, it would be wrong to discuss it much, and the bill was dismissed, but without costs, the defendants not praying them.

In a case, however, decided with much care and learning by Sir Joseph Jekyll when Master of the Rolls, in Hilary Term, 1732 (*b*), dower of an equity of redemption was, under special circumstances, allowed. In that case, a mortgagor devised his real estate to a trustee in fee, and bequeathed to him his personal estate in trust to pay debts and legacies, and to bring up and educate Robert Sutton until twenty-one or marriage, and *then to settle* a moiety of the estate on him and the heirs of his body. The trustee proved the will, possessed the personal estate,

(*a*) Powell on Mortgages, 4 Edition, 726.

(*b*) Banks v. Sutton, 2 Pr. Wms. 700.

paid off the mortgage, and took an assignment of it to a trustee for himself. Robert Sutton attained twenty-one, and married and lived some years afterwards. The trustee did not settle the moiety, but received part of the mortgage-money by perception of profits. Robert Sutton died, and his widow filed her bill to redeem. And it was decreed, according to the reported case, on two grounds, first, that if a trust is created by a stranger and not by the husband, and the trust estate is directed to be conveyed to the husband at a given time, and he is living at the time appointed for the conveyance, equity, which looks on that which ought to be done as done, will consider the legal estate as actually vested in him, at the time when the conveyance ought to have been executed; and, secondly, that supposing the legal estate could not be considered as vested in the husband by reason of the outstanding mortgage, yet he was entitled to redeem; which right conferred on the widow a similar right. The arrears of her dower were accordingly decreed her, she allowing a third of the interest of the mortgage-money. The case of Dixon v. Saville has expressly over-ruled the authority of the decision of this case on the second point, and according to a manuscript note of the case of the Attorney General v. Lockley and others (*a*), Lord Talbot is reported to have said, that the true reason for the decree in Banks v. Sutton was, that the wife married Sutton on the expectation of the estate, and it was *a fraud* in the husband not

(*a*) Sugden's Vendors' and Purchasers' Appendix.

to call for the settlement, and, if so, the first ground of decision may be considered as not of much weight (*a*).

Prior to the statute of frauds (*b*), trust estates, not being cognizable at common law, were not extendible on an elegit, statute or recognizance (*c*). By that statute it was enacted, that it should be lawful for every sheriff or other officer to whom any writ or precept should be directed, at the suit of any person or persons, of, for or upon any judgment, statute or recognizance thereafter to be made or had, to do, make and deliver execution unto the party in that behalf suing of all such lands, tenements, rectories, tithes, rents and hereditaments as any other person or persons were in any manner seised or possessed, or thereafter should be seised or possessed, in trust for him against whom execution was so sued, like as the sheriff or other officer might or ought to have done, if the said party, against whom execution thereafter should be so sued, had been seised of such lands, tenements, rectories, tithes, rents or hereditaments of such estate as they be seised of in trust for him *at the time of such execution sued*, which lands, &c. should accordingly be held and enjoyed, freed and discharged from all incumbrances of such person or persons as should be so seised or possessed, in trust for the person against

(*a*) *Et vide* Attorney General v. Scott, Ca. Temp. Talb. 138, and cases in note. D'Arcey v. Blake, 2 Sch. and Lefroy, 391.

(*b*) 29 Car. 2. Cap. 3. Sec. 10.

(*c*) 1 Roll. Ab. 888. 6.

whom such execution should be sued. And the statute further enacted, that if any *cestuique* trust thereafter should die, leaving a *trust in fee simple* to descend to his heir, such trust should be deemed and taken to be assets by descent, and the heir should be liable to and chargeable with the obligation of his ancestor, for and by reason of such assets, as fully and amply as he might or ought to have been, if the estate in law had descended to him in possession, in like manner as the trust descended.

Since the passing of this statute, trust estates of inheritance have become subject to an execution at law; but according to a recent case (*a*), trusts of a chattel interest remain in the same plight as they did prior to the statute, and therefore the sheriff was justified in an instance in which the debtor had no other property than an equitable interest in a term of years, in returning *nulla bona* to the writ of *fieri facias*, at the suit of a judgment creditor.

This decision confirmed the preceding decisions in equity, that an execution at law will not affect *the equity of redemption of a term* (*b*); whether an equity of redemption of an estate of inheritance is also not extendible, does not seem to be quite so clearly determined. In Lyster v. Dolland (*c*), a mort-

(*a*) Scott v. Scholey, 8 East, 466. *Et vide* Metcalf v. Scholey, 2 New Rep. 461. S. P.

(*b*) Burdon v. Kennedy, 3 Atk. 738. Lyster v. Dolland, 1 Ves. Jun. 431. 3 B. C. C. 480.

(*c*) *Supra*.

gagee of a *chattel* interest obtained possession by an ejectment at law of the leasehold premises, and afterwards proceeded against the mortgagor under his bond, and obtained judgment, and took the mortgage premises in execution. The sheriff sold the whole interest in the term to a trustee for the mortgagee. On a bill filed to redeem, Lord Chancellor Thurlow seems at first to have thought the equity of redemption in a term might be taken in execution under the statute, and his chief difficulty on first hearing the cause, arose from the sheriff having sold the whole interest in the term under the execution, and not merely the equity of redemption; but on the next day he observed, that on looking into the statute he did not think the case within it; he had thought the words of the statute had been much larger, and that the words "equitable interests" were contained in it, but found himself wrong, and he thereupon let the plaintiffs in to redeem. It does not clearly appear from the report in Vesey, whether Lord Thurlow's observations went to equities of redemption generally, or were confined to the equity of redemption of a term; but Brown, in his Report, says he was informed the Lord Chancellor decreed in favour of the plaintiffs, on the ground that an equity of redemption was not liable to be taken in execution under the 29 Car. 2. c. 3. and his Lordship desired, that might be taken notice of as the ground of the judgment. However, according to the cases of Scott v. Scholey and Metcalf v. Scholey, the sheriff would not have been justified in the sale, even if it had been a mere trust estate, and the case of Lyster v. Dolland may therefore be considered as proving

too much. In Plunket v. Penson (*a*), heard before Lord Chancellor Hardwicke, in which the principal question was, whether an equity of redemption of a mortgage in fee of a trust estate was legal or equitable assets, his Lordship said, he should be glad to know if there was any instance where an equity of redemption had ever been held to be liable to the execution of a bond creditor in the lifetime of the mortgagor, to which the counsel answered, they could not recollect any instance where it had been so held. On the principal question, in that case, his Lordship said, "I do agree that if a mere trust estate descends upon an heir at law, it will be considered as legal and not as equitable assets, and this is founded upon the third clause of the statute which gives a specialty creditor his remedy at law by an action of debt against the heir of the obligor, but it has not made a mortgage in fee of a trust estate subject to the same thing.

"If there is a mortgage for a thousand years, and the reversion in fee left in the mortgagor, it will be legal assets, because the bond creditor might have judgment against the heir of the obligor, and a *cesset executio* till the reversion come into possession; but where it is a mortgage of the whole inheritance, I do not see what remedy a bond creditor can have to make it assets at law; and if the specialty creditor should bring an action against the heir, he may plead *riens per descent.* Therefore, if the plaintiff is under

(*a*) 2 Atk. 290.

a necessity of coming here for relief, this Court will act according to its known rule of doing equal justice to all creditors, without any distinction as to priority."

Now this was certainly deciding that an equity of redemption was not to be considered as a *mere trust estate by descent*, for, if the equity of redemption had been a trust by descent, the heir could not since the statute, it is conceived, have pleaded *riens per descent;* and if it is not to be considered in the light of a trust estate, then it is not within the words of the third section of the statute, and consequently not extendible (*a*). In this doctrine the Courts and the Profession appear to have acquiesced, and the case of Plunket v. Penson was recognized in Scott v. Scholey, and part of the words above quoted were cited by Mr. Justice Lawrence with approbation, and it may therefore be admitted as settled doctrine, that an equity of redemption of an estate of inheritance is not extendible under a judgment at law.

However, although the equity is not extendible by the sheriff, the judgment, nevertheless, forms an equitable lien on the land, and the creditor may file his bill to redeem, as will be hereafter explained.

Assets in a Court of Equity are legal or equitable.

(*a*) *Et vide* Lyster v. Dolland, 1 Ves. Jun. 436, at the end of case.

They are considered equitable either in respect of the testator's intent, as in the case of a charge upon the real estate for payment of debts generally, or in respect of the interest of the party in the property being purely equitable, and not made legal assets by any statute (*a*). If they are of chattel interest and legal, they will be administered by the personal representatives of the deceased in a due course of administration. If they are assets real, and legal, the heir or devisee will take, subject to the judgment or specialty debts of his ancestor or testator, and to the right in the simple contract creditors of having the assets marshalled, in case the specialty creditors shall exhaust the personal estate; and if the possessor is a trader within the bankrupt laws, the heir or devisee will take, subject to the equity of the simple contract creditors, under the 47 Geo. III. sess. 2. cap. 74. If assets, whether real or personal, are equitable, they will be applicable in satisfaction of all the creditors *pari passu*, excepting that judgment creditors having a general lien, and thus having a right to come in and redeem a subsisting mortgage, are also entitled to preference in the distribution of equitable assets, consisting of an equity of redemption (*b*). But after a bill filed by creditors, the executor cannot by confessing judgment give preference (*c*), and the Court will, after a decree against the executor to account, restrain creditors from proceeding against him at law, and direct them to come in under the decree (*d*).

(*a*) Fonbl. Treat. on Equity, 2 vol. 399.

(*b*) Sharpe v. the Earl of Scarborough, 4 Ves. Jun. 538.

(*c*) Solley v. Gower, 2 Vern. 61.

(*d*) Potts v. Layton, Toller's Executors, 456.

Before the statute of frauds, all trust estates were equitable assets. By that statute, as before remarked, *trust estates in fee simple* are rendered liable to an execution at law.

A trust estate of inheritance, therefore, became legal assets; and, by analogy, it was held that an equity of redemption was also legal assets (*a*), but in Plunket v. Penson (*b*) Lord Hardwicke, as before remarked, determined them to be equitable, and the heir may, on an action against him by a specialty creditor, plead *riens per descent* (*c*).

If the mortgage is but for term of years, leaving a legal reversion in the mortgagor, the reversion in fee will be of course legal assets (*c*), for the specialty creditors might have judgment at law with a *cesset executio* until the reversion fell into possession, as before observed (*d*). But the judgment will be only of assets *quando acciderint*, and the creditor cannot, by bill in equity, compel the heir to sell the reversion, but must expect it when it falls (*e*).

If the mortgage be in fee, and there be judgment creditors, although, as before noticed, they cannot

(*a*) 2 Freem. Pl. 130. The reporter adds, "Come al moy fuit dit per Sir F. Winnington, il esteant de concilio en le case," *et vide* 3 Leon. 32.

(*b*) Plunket v. Penson, *supra*. *Et vide* Solley v. Gower, *supra*.

(*c*) *Supra*, page 54. *Et vide* Placknet v. Kirk, 1 Vern. 414.

(*d*) *Supra*, page 54.

(*e*) Fortrey v. Fortrey, 2 Vern. 134.

extend the equity, they, nevertheless, have a general lien in equity upon it, and consequently the equity of redemption will, as to them, be deemed legal assets, and applicable accordingly, nor will the assets in the case of judgment creditors be marshalled in favor of simple contract creditors (*a*).

An equity of redemption of a leasehold estate is also it should seem equitable assets (*b*), notwithstanding the doubt thrown out in Sharpe v. the Earl of Scarborough.

It seems to have been formerly held (*c*), that if an equity of redemption was devised to *executors* for payment of debts, it became legal assets; for that such a devise shewed the testator's intention that it should be so applied. But this doctrine is now overruled (*d*), and an equity of redemption remains equitable assets, whether devised to trustees generally or to executors for payment of debts.

It has been already said, that a mortgage made subsequently to a devise, is but a revocation *pro tanto* in equity. In like manner, the execution of a power by way of mortgage, whether in fee or for years, is

(*a*) Sharpe v. Scarborough, 4 Ves. Jun. 538. Fortrey v. Fortrey, 2 Vern. 134.

(*b*) The creditors of Sir Charles Cox, 3 P. Wms. 342. Hartwell v. Chitters, Amb. 308. *Sed vide* Wilson v. Fielding, 2 Vern. 764.

(*c*) Girling v. Lee, 1 Vern. 63.

(*d*) See Lewin v. Okeley, 2 Atk. 50. and cases in note.

but an appointment *pro tanto* (*a*), unless there be on the face of the instrument an indication of an ulterior intention, inconsistent with a future exercise of the power (*b*), and the right of redemption will remain in the persons entitled to the estate in default of appointment (*c*).

On the principle before stated, that the mortgagor remains the actual owner of the estate, it has been determined (*d*) that the mortgagor of an advowson

(*a*) Thorne v. Thorne, 1 Vern. 141, and Perkins v. Walter, Ibid. 97. Note *.

* The marginal extract in this case mistakes the facts, for it is there stated to be an authority, that a mortgage, after a voluntary settlement, with power of revocation, and a will in confirmation of it, is a revocation *pro tanto* only; but it does not appear from the circumstances stated, that the voluntary settlement contained any such power, nor did it require it to give effect to the mortgage, the settlement itself being void, under 27 Eliz., as against a *bonâ fide* purchaser, which a mortgagee *pro tanto* is. It contained a power for the tenant for life to appoint the estate for a thousand years at any rent; he accordingly appointed the estate to trustees, upon trust, by sale or mortgage, to raise certain sums for payment of debts, and to discharge a mortgage, and for other purposes, and in *this deed* reserved a power of revocation, and afterwards mortgaged the estate, having first, by his will, confirmed the voluntary settlement, and appointed other sums to be raised out of the term. It was contended, the subsequent mortgage revoked the will and the appointment to the trustees, *sed non allocatur*, "it might be a revocation *pro tanto*, but not otherwise."

(*b*) Fitzgerald v. Fauconberg, Fitzg. 207.

(*c*) Innes v. Jackson, 16 Ves. Jun. 356. *et vide infra.*

(*d*) Jory v. Cox, Prec. Chan. 71. Amhurst v. Dawling, 2 Vern. 401. Galley v. Selby, Stra. 403. Mackenzie v. Robinson, 3 Atk. 559. which over-ruled Gardiner v. Griffith, 2 Pr. Wms. 403. *Et vide infra.*

has a right to nominate to the living on a vacancy, and to compel the mortgagee to present his nominee, even although there be an actual engagement between them, that the mortgagee shall, after default made, have the right to present.

In like manner an equity of redemption may itself become the subject of mortgage, and each equitable mortgagee shall have preference according to his priority in time, the maxim of equity being, *Qui prior est in tempore, potior est in jure* (*a*). Of the protection afforded by the statute law to the mortgagee of an equity of redemption, and by what means a subsequent mortgagee of the equity of redemption may obtain preference to a prior mortgagee of the equity, an explanation will be given in the subsequent chapters.

There may be also a *possessio fratris* of an equity of redemption (*b*).

Whether an equity of redemption is subject to escheat does not seem to have been precisely determined; but the reasoning of the Lord Keeper in Burgess v. Wheate (*c*), as well as the principles on which he determined that a mere trust estate was not so subject, may fairly lead us to conclude that an

(*a*) Fonb. Treat. Equ. 1 vol. 319. and cases in note. And see also *ex parte* Knott, 11 Ves. Jun. 609.

(*b*) Casborne v. Scarfe, 1 Atk. 603.

(*c*) Burgess v. Wheate, 1 Bl. Rep. 123. *Et vide* Fawcett v. Lowther, 2 Ves. 304.

equity of redemption is not liable to escheat, for, as remarked by the Lord Keeper, it is a question of tenure and not of forfeiture, and the right to escheat arises *pro defectu tenentis*; so long as the lord has his tenant to perform his services, the land cannot revert in demesne, and the crown has no equity on which to sue a *subpœna*. How far the Court would interfere, in case the mortgagee in such case should also proceed on his bond or covenant to recover the debt from the personal representatives of the mortgagor, remains to be seen; but according to the opinion of the Master of the Rolls, in Burgess v. Wheate (*a*), the Court would, under such circumstances, direct the mortgagee to convey the estate to the executors. This, however, was merely an *obiter dictum*, and cannot be relied on; but it may be considered clear, equity would not allow the mortgagee to have both the money and the estate.

An equity of redemption is subject to crown debts, and it may be sold under an extent of the Court of Exchequer, pursuant to the 25 Geo. 3. cap. 35. (*b*).

(*a*) 1 Blackst. Rep. 149.

(*b*) 13 Eliz. Cap. 4. Rex v. Delamotte, Forrest. R. Exch. 162.

CHAPTER V.

Of Statutes Merchant, Statutes Staple, Recognizances, and Elegit.

Before we proceed further, it may be proper to enquire into the nature of certain compulsory modes by which lands may, by force of the statute law, be rendered a security for debt.

It has been already noticed, that the common law did not, as between subject and subject, allow the lands themselves to be taken in execution on a judgment for debt or damages; for if they might have been so taken, then a tenant might have been intruded on the feud against the lord's consent; and thus by a circuitous route, an alienation might have been effected against his will. The creditor therefore could only, by the common law writ of *fieri facias*, take the goods and chattels of his debtor, and by writ of *levari facias*, take the growing profits of the land; and even of these latter he might be deprived by subsequent alienation of the land itself. The crown indeed might at common law have taken the lands of its debtor, by force of its prerogative, and a creditor might, on judgment against the heir, on a specialty debt of the ancestor, have taken the land; for otherwise he would, as against the heir, have been remediless.

The inconvenience of this rigid system began to be soon felt by a growing commercial state, and the

statute of Acton Burnell (*a*) in its preamble notices, that merchants who had lent their goods to divers persons were greatly impoverished, because there was no speedy law provided for them to have recovery of their debts at the day of payment assigned, and by reason thereof many merchants had withdrawn, to the damage as well of the merchants as of the whole realm. And it therefore provided a remedy hereafter noticed of a *statute merchant*, being a bond or obligation on record, taken before the mayor of the place, and entered on record, and sealed with the seal of the debtor and the king.

A much more extensive remedy was soon after provided for the creditor by the 13 Edward 1. cap. 18. which enacted, that when a debt was recovered *or acknowledged* in the King's Court, or damages awarded, it should be in the election of the creditor to have a writ of *fieri facias* unto the sheriff, to levy the debt of the lands (*i. e.* the profits) and goods, or that the sheriff should deliver to the creditor all the chattels of the debtor, (saving only his oxen and beasts of his plough,) and the one-half of his land, until the debt was levied upon a reasonable price or extent; and if he were put out of that tenement he should recover by a writ of novel disseisin, and after, by a writ of redisseisin, if need should be. In consequence of this statute, a writ was framed since called a writ of elegit, from the words of the entry on the roll, "Quod elegit sibi executionem

(*a*) Statute of Acton Burnell, 11 Edw. 1.

fieri de omnibus catallis et medietate terræ." On the suing out of this writ, the sheriff must impannel a jury, who are to inquire into all the goods and chattels of the debtor, and make an appraisement of the same, and the sheriff must deliver them to the creditor at the appraised price; and the jury are also to inquire as to his lands (not being copyhold, which are not liable to be extended under an elegit) (*a*), and appraise their value, and set out and deliver to the creditor a moiety of them by metes and bounds, at the extended value. But the sheriff need not deliver a moiety of *each* tenement (*b*); it is sufficient if it appear the lands extended are but a moiety in value of the whole. If the sheriff extends more than a moiety, and the fact appears on the return, it seems the execution is merely void (*c*).

This statute extending to the case of a debt *acknowledged* in the King's Court, a mode of security was suggested, which gave the creditor an immediate hold upon the land, and at the same time saved him the expense of actual process to obtain judgment. This was by a warrant of attorney, authorizing certain attornies to appear for the debtor, and confess the debt in a court of record, whereupon judgment might be forthwith entered up, and a writ

(*a*) Heydon's case, 3 Co. 9. nor, according to Rolle, is a lease by licence, 1 Roll. Ab. 888. 3.

(*b*) Den v. Lord Abingdon, Doug. Rep. 473.

(*c*) Putten v. Purbeck, 2 Salk. 563. *Sed vide contra* Carthew, 453. *Et vide infra.*

of execution *instanter* sued out (*a*). Between a judgment so obtained and a judgment obtained in an actual action, Lord Kenyon, in Doe v. Carter, said he saw no difference (*b*), since the object of the former was merely to shorten the process and to lessen the expense of the proceeding.

When lands are extended under an elegit, they are delivered to the creditor to hold "*quousque debitum satisfactum fuerit*," that is, until the debt recovered, and stated damages are repaid, and no other damages or expenses nor even interest are allowed (*c*); and as the annual value of the land extended is ascertained by the inquisition and extent, the time when the debt will be satisfied is certain, and the debtor may re-enter without a previous writ of *scire facias* (*d*). But as the lands are always extended much below the real value, and as the debtor cannot on a writ of *ad computandum* at law insist on the creditor's doing more than account for the extended value, he is driven for remedy into a court of equity, which act-

(*a*) Holbird v. Anderson and another, 5 Term Rep. 235.—Note—In this case, the debtor had been sued to judgment by a creditor, who was entitled to sue out execution on the 8th of May, on which day the debtor voluntarily went to another creditor, and gave him a warrant of attorney to confess judgment against him, on which judgment was immediately entered up, and execution levied on the same day two hours before the first creditor's execution reached the sheriff's office, and it was held the preference was not unlawful nor fraudulent within the meaning of the 13 Eliz. c. 5.

(*b*) Doe v. Carter, 8 Term Rep. 61.

(*c*) Fulwood's Case, 4 Rep. 67. 2 Inst. 678.

(*d*) Burwell v. Harwell, Cro. Car. 598. Fulwood's Case, *supra*.

ing on its principle, that he who seeks equity shall do equity, will compel him to pay interest on the debt, although it should exceed the penalty on the judgment (*a*).

The sheriff formerly delivered actual possession of the land extended. He now delivers legal possession only (*b*), and actual possession must, it seems, be obtained by ejectment (*c*). In a recent case (*d*), however, Chief Justice Gibbs said, he had always been of a different opinion, but he would not consider the case then under consideration as deciding the point. If there be a tenant in possession under a lease granted prior to the date of the judgment (*e*), the creditor cannot succeed in ejectment; for the legal title must prevail, even although he give the tenant notice that he does not mean to disturb his possession, but only to get into the receipt of the profits. He may, however, extend a moiety of the reversion and of the rent, and he will have the like remedies for the moiety of the rent as the debtor himself had (*f*). The debtor cannot, as before observed, by writ *ad computandum* at law, compel the creditor to account for the profits beyond the extended value; yet, if by some casual profit, the credi-

(*a*) Godfrey v. Watson, 3 Atk. 517. Owen v. Griffith, Amb. 520.

(*b*) 2 Saund. 69. a.

(*c*) Taylor v. Cole, 3 Term Rep. 295. 2 Tidd's Pract. 1075. 6th Edit. Bull. Nisi Prius, 104.

(*d*) Rogers v. Pitcher, 6 Taunt. 206. 7.

(*e*) Doe v. Wharton, 8 T. R. 2. Rogers v. Pitcher, *supra*.

(*f*) Campbell's Case, 1 Roll. Ab. 894. Pl. 5. 2 Leon. 113. Bishop of Bristow's Case, Moor, 36.

tor is satisfied his debt (*a*), or if part has been levied, and the debtor in court tender him the residue (*b*), he may have his writ of *scire facias ad rehabendam terram*, to ascertain the accidental profit, and for recovery of the land: but in this latter case the tender must be in court, and of the money actually due, and not an offer to come to an agreement: the debtor may also have a *scire facias*, if he has obtained an acquittance; but a *scire facias* will not lie on a general averment that the debtor has received his debt, which may have happened through the improvement of the land by the creditor, of which the debtor can take no advantage (*c*). If a creditor has two judgments against one debtor (*d*), he may take both moieties in execution; but if one moiety be already taken in execution, a second judgment creditor can take but one-fourth (*e*), that is, a moiety of the remaining moiety, and so of the like.

Copyholds, as already remarked, are not liable to an extent (*f*): nor, it should seem, is an advowson in gross (*g*) nor glebe lands belonging to a parsonage or vicarage (*h*); but rent-charges (*i*), lands whereof a man is seised *jure uxoris* (*k*), lands in ancient demesne (*l*); and, in short, every other species of

(*a*) Bac. Ab. Ex. 707. 2 Inst. 396. (*b*) 2 Roll. Ab. 482.
(*c*) 2 Roll. Ab. 483. Bac. Ab. Execution, 708.
(*d*) Attorney-General v. Andrew, Hard. 23.
(*e*) Huyt v. Cogan, Cro. Eliz. 482. (*f*) *Supra* 64.
(*g*) Gilb. Exec. 39. *Sed vide* Robinson v. Tonge, 3 P. W. 401.
(*h*) Jenk. 207. (*i*) Mo. 32.
(*k*) Dalt. Sher. 136. (*l*) Cox v. Barnsley, Hob. 47, 48.

landed property, except as before-mentioned, seem liable to the extent; but if an estate tail be extended, the issue may avoid it, after death of tenant in tail, by assise or writ of *auditâ querelâ* (*a*), and if one of two joint tenants confess a judgment, and die before execution, it will not bind the survivor (*b*).

A judgment is a general lien which will bind lands whereof the debtor is possessed, not only at the time of entering up the judgment, but those also which he shall subsequently acquire, and no subsequent alienation, even to a purchaser without notice, will defeat it (*c*); but such a purchaser may protect himself against prior judgments, of which he had no notice when he purchased, by procuring the conveyance or assignment of a prior outstanding term or legal estate.

A term, in the consideration of law, being but one day, the consequence was, that a purchaser or mortgagee, although prior to the judgment creditor, was nevertheless bound by the judgment, if the purchase or mortgage and judgment were within the same term; for the judgment would relate to the first day of the term (*d*).

To remedy this, the statute of frauds and perju-

(*a*) Ashburnham v. Saint John, Cro. Jac. 85. Gilb. Exec. 391.
(*b*) 1 Inst. 184. b. Abergavenny's Case, 6 Rep. 78.
(*c*) 2 Inst. 395. 1 Roll. Ab. 892. Pl. 14 and 16. 2 P. Wms. 492.
(*d*) 2 Saund. 9.

ries (*a*) enacted, that the judge or officer signing the judgment should set down the day of the month and year of his so doing upon the paper book, docket, or record, which he should sign, which date should be also entered on the margin of the roll of the record, where the judgment was entered, and that purchasers, &c. (*b*) should be charged from such time only, and not from the first day of the term, whereof the judgment was entered. By subsequent statutes (*c*), judgments are required to be docketed, viz. those of Michaelmas and Hilary terms, before the last day of the ensuing terms, and those of Easter and Trinity terms, before the last day of Michaelmas term. And it is declared, that no judgment not so docketed, shall affect purchasers or mortgagees (*d*). A docketing after the time limited by the statute will, it seems, be of no avail against any subsequent purchaser or mortgagee, unless he has notice of the judgment, when he will be bound by it in equity, although it is not docketed according to the statute (*e*).

In Hodges v. Templar (*f*), Lord Holt said, "If one will enter judgment as of a term, he must actually enter it before the essoign day of the succeeding term, otherwise it shall only relate to the term of which he enters it; and, he adds, if judgment be

(*a*) 29 Car. 2. cap. 3. sect. 14. (*b*) Ibid. sect. 15.
(*c*) 4 & 5 Will. and Mary, cap. 20. 7 & 8 Will. 3. cap. 36.
(*d*) Forshall v. Coles, 7 Vin. Ab. 54.
(*e*) Davis v. Strathmore, 16 Ves. 419. Thomas v. Pledwell, 7 Vin. Ab. 53. *contra.* Forshall v. Coles, *supra.*
(*f*) *Supra.*

signed in Hilary term, and in the subsequent vacation the defendant sells lands, and before the essoigns of Easter term, the plaintiff enter his judgment, it shall affect the lands in the hands of the purchaser, and if one enter judgment in vacation, when indeed the party was dead, yet if he was living in the preceding term, the judgment is good by relation; so that it seems a purchaser might still be over-reached by a judgment signed prior to his purchase, &c., but entered subsequently to it. It is said, however, that no practical inconvenience results from this to purchasers, as it is the practice to index judgments as soon as they are signed (*a*).

Chattels personal and leaseholds, since the statute of frauds, are bound from the time of delivery of the writ of execution into the hands of the sheriff (*b*), and, as between different plaintiffs, the sheriff must give priority to the writ of *fieri facias* first delivered to him, from which time the goods are bound (*c*).

It has been already mentioned, that an equity of redemption is not extendible (*d*). If a judgment be entered up after contract for sale and actual payment of the purchase-money, but previously to the

(*a*) *Vide* Sugden's Vendors and Purchasers, 504. 3d Edit. *Et vide* Tidd's Pract. 966. 6th Edit. Mayor of Norwich v. Berry, 4 Burr. 2277.

(*b*) 29 Car. 2. cap. 3. sect. 16. Burdon v. Kennedy, *supra*, 739. Jeanes v. Wilkins, 1 Ves. 195.

(*c*) Hutchinson v. Johnson, 1 Term Rep. 729.

(*d*) *Ante*, page 55.

conveyance, the purchaser will, it seems, be relieved against it in equity (*a*). If a mortgagee in fee purchase, he will, of course, be protected from all judgments subsequently to his mortgage, of which he had not notice (*b*).

A difference of opinion has prevailed (*c*), whether in equity, judgments bind a subsequent purchaser or mortgagee who had notice of them, but who, previously to execution sued out, obtained a conveyance from trustees, in whom the lands had been vested prior to the obtaining of the judgments. By the express words of the statute, which directs that execution may be delivered of all such lands as any other persons shall be seised of, in trust for the debtor, in the same manner as if he had been seised of such lands of such estate, as they shall be seised of in trust for him at the time of the *execution sued*, and by the authority of the case of Hunt v. Coles (*d*), it would seem clear, that *at law* the lands are not liable. But it is said that they are liable *in equity* if the purchaser, &c. had *notice;* and in behalf of this opinion it has been argued (*e*), the lands would have been so liable prior to the statute of frauds, and it cannot be supposed the statute intended to conclude the equitable relief. In support of this opinion, the

(*a*) Finch v. Earl of Winchelsea, 1 Pr. Wms. 277.

(*b*) Sugden's V. and P. 335. 3d Edit.

(*c*) See Powell on Mortgages, 4th Edit. 506. Sugden's V. and P. 336.

(*d*) Hunt v. Coles, Com. 226. *Et vide* Com. Dig. Title Execution, (C. 14.) and 2 Saund. 11.

(*e*) Sugden's V. and P. 337. 3d Edit.

cases of equitable relief, under the registry acts, are referred to. On the other side, the argument is, that as equity follows the law (*a*), no relief will be granted against the purchaser, through the medium of a Court of Equity; and it is admitted by the opposite party, that after the most diligent search, there is no instance to be found of relief granted to a judgment creditor against a conveyance to trustees, where the purchaser has subsequently acquired the estate (*b*).

The wording of the statute is strong, nor does there seem good reason for disputing the soundness of the judgment in Hunt v. Coles (*c*). The comparison made between the decisions on the registry acts and the point in question is certainly ingenious; but on consideration it will be discovered, the comparison does not altogether hold good, for the equitable decisions under the registry acts were made *in favour* of purchasers, and for their protection against fraud; while on the contrary, to hold the purchaser with notice, subject to judgments in the case contended for, would be to take from him the protection of the express words of the statute passed for his benefit. And after all, the judgment creditor will not be in a worse situation in respect of a trust estate, than in respect of a leasehold; and it is his own fault not to pursue his remedy sooner. However, until the point has received a judicial decision, a purchaser

(*a*) Higgins v. The York Buildings Company, 2 Atk. 107.
(*b*) Sugden's V. and P. 4th Edit. (*c*) Ibid. 337. 3d Edit.

or mortgagee, with notice of judgments, cannot be advised to rely on the security of a conveyance of a prior outstanding legal estate.

A Court of Equity will not oblige a creditor to wait until he is paid out of the rents, but will accelerate the payment by a sale of the moiety (*a*).

If the inquisition by the sheriff be void for any defect appearing on the face of it, the Court will, on suggestion thereof, or on a writ of *scire facias*, order the writ to be vacated, and award a new one and amerce the sheriff (*b*).

If the debtor be possessed of a term for years, the sheriff may either extend it, that is, deliver a moiety of it to the creditor, or he may sell the whole term to the creditor as part of the personal estate of his debtor, at a gross price, appraised and settled by the jury (*c*). The debtor may save the term by tender to the sheriff prior to its delivery to the creditor, or by tender in Court before actual delivery by the sheriff; but if no such tender is made, the property is altered by the delivery of the sheriff, and the creditor may dispose of it without being accountable for the profits (*d*). If, however, the judgment be afterwards reversed, the sale and delivery

(*a*) Stileman v. Ashdown, 2 Atk. 610.

(*b*) 2 Saund. 69, *note*.

(*c*) 2 Inst. 395. Fleetwood's case, 8 Rep. 171. a. Dalt. Sher. 137.

(*d*) Gilb. Ex. 34. 2 Saund. Rep. 68. Comyn v. Brandlyn, Mo. 873.

will be void, and a writ of restitution awarded. But if the term had been sold under a *fieri facias*, and the judgment had been reversed, the sale would have been valid (*a*).

After the sheriff has delivered the lands to the creditor under an elegit, he cannot have either a *fieri facias* or *capias ad satisfaciendum* (*b*). But if the sheriff return *nihil* to the elegit, or if nothing be done on the writ, the creditor may sue out a *capias ad satisfaciendum* or *fieri facias*, or may have debt on the judgment (*c*). And after a *fieri facias*, the creditor may have either a *capias* or elegit (*d*). If the creditor be evicted out of the extended lands, he may have a *scire facias* out of the Court from which the first execution issued, on which a new writ may issue (*e*). And the remedy extends to his personal representatives (*f*). Or if the record is removed on error into another Court and affirmed there, he may also have a *scire facias* out of that Court. But to give him the benefit of the statute, he must be evicted from all the lands, and not from part only (*g*).

Although the creditor under the elegit holds the lands "*as his freehold*," yet he has a chattel interest

(*a*) Goodyere v. Ince, Cro. Jac. 246. Bac. Ab. Ex. 740.

(*b*) Tidd's Pract. 1033. 6th Edit.

(*c*) Knowles v. Palmer, Cro. Eliz. 160. Cooper v. Langworth, Moor, 545. Pl. 724. Palmer v. Knollis, 1 Roll. Ab. 905, pl. 6. 1 Leon, 176. Bacon v. Peck, 1 Str. 226. Glascock v. Morgan, 1 Lev. 92.

(*d*) Tidd's Pract. 1062.

(*e*) 32 Hen. 8. c. 5. (*f*) Co. Litt. 290. a.

(*g*) Co. Litt. 289. b. Fulwood's Case, *supra*. Crawley v. Lidgeat, Cro. Jac. 338.

only, which devolves on his personal representatives (*a*).

It is a general rule, that execution cannot be sued out after a year and a day, without a writ of *scire facias*; but if a writ has issued, and been returned and filed, it may be continued by entry on the roll of "vicecomes non misit breve." It seems doubtful, whether the mere awarding of a writ of elegit on the roll within the year, will warrant the entry of the continuances (*b*). The debtor may by agreement waive the benefit of requiring a writ of *scire facias*, to revive the judgment, as is the usual practice on warrants of attorney; and if a writ of execution has been issued within the year, a different writ of execution may be awarded after the year, without a *scire facias* (*c*). If the executor or administrator of the creditor proceed on the judgment, they must sue out a *scire facias*, even within the year (*d*). The creditor may award on the roll several writs of elegit into several counties for the whole debt (*e*). The proper mode of discharging a judgment is by entering up satisfaction on the record (*f*), or the judgment may be released by deed, which, although it does not vacate the judgment, will be good cause, in case execution is sued out, on which to ground a writ of *auditâ querelâ*, to annul the

(*a*) 1 Inst. 42. a. 2 Inst. 396. a.

(*b*) Blayer v. Baldwin, 2 Wils. 82. 2 Saunders, 68. b. *Sed vide* Seymour v. Greenvill, Carth. 283. Tidd's Pract. 1116. Bac. Ab. Exec. 130.

(*c*) Ares v. Hardress, 1 Stra. 100. (*d*) 2 Inst. 395.

(*e*) Dyer, 162. (b) Pl. 51. Earl of Worcester's Case, Moor, 24. Pl. 83. Goodyere v. Ince, *supra*. Yelv. 179. 2 Saund. 68. a.

(*f*) For the mode of doing this, see Tidd's Pract. 1096.

execution (*a*); and after a considerable lapse of time, viz. twenty years, the Courts will presume the judgment satisfied (*b*); and it seems the defendant may, on an old judgment, plead payment under the 4th of Ann, Cap. 16. Sec. 12. (*c*).

Recognizances are of two sorts; viz. recognizances by the common law, and recognizances by the statute law. Of the latter we shall speak presently. Recognizances by the common law are obligations acknowledged by the debtor before any of the judges in or out of term, and in any part of England, or before the Lord Chancellor, or any other person for such purpose appointed by the king, or, by the custom of London, before the lord mayor and aldermen, or lord mayor singly, and perfected by enrollment in some court of record (*d*), and on which execution may be sued out, in like manner as on a judgment. If execution is not sued out within a year and a day after the day assigned in the recognizance, a writ of *scire facias* must issue to revive the judgment (*e*); recognizances must, it seems, be enrolled within six months after being acknowledged (*f*), and they bind lands in the hands of a purchaser, from the time of enrolment (*g*).

The statute of Acton Burnell, as before mentioned (*h*), created the *statute merchant.* This statute

(*a*) Bac. Ab. Ex. 707.
(*b*) Peake's Evidence, 25. note. Tidd's Pract.
(*c*) Kemys v. Ruscomb, 2 Atk. 45.
(*d*) Bacon's Ab. Execution, 687.
(*e*) Ibid, 693.
(*f*) 2 Saund. 8.
(*g*) Ibid.
(*h*) *Supra,* page 63.

was partial in its operation, and the sheriffs, it is said, misinterpreted its provisions, and sometimes, by malice and false interpretation, delayed its execution: the statute of the 13 Edw. 1. stat. 3. (*a*), therefore, at once enforced and extended the remedy by enacting, that a merchant who would be sure of his debt, should cause his debtor to come before the mayor of London, or before some chief warden of a city, or of another good town where the king should appoint: and, that he should, before the mayor and chief warden or other sufficient men chosen and sworn thereto, when the mayor or chief warden could not attend, and before one of the clerks that the king should thereto assign, when both could not attend, *acknowledge the debt and the day of payment*, and the recognizance should be enrolled by one of the clerks, and the roll should be double, whereof one part should remain with the mayor or chief warden, and the other with the clerks that thereto should be first named; and further, *one of the said clerks*, with his own hand, *should write an obligation*, to which writing *the seal of the debtor* should be put, *with the king's seal* provided for the same intent, which seal should be of two pieces, whereof the greater piece should remain in the custody of the mayor or chief warden, and the other piece in the keeping of the aforesaid clerk, and if the debtor did not pay at the day limited to him, then should the merchant come to the mayor and clerk with his obligation, and if it were found by the roll or writing, that the debt was acknowledged and the day of payment expired, the mayor or chief warden should cause the body of the debtor

(*a*) 13 Edw. 1. stat. 3.

to be taken (if he were lay) whensoever he happened to come in their power, and should commit him to the prison of the town, there to remain until he agreed for the debt; and if the debtor was not in the power of the mayor or chief warden, then the mayor or chief warden should send the recognizance *into Chancery under the king's seal,* and the Chancellor should direct a writ unto the sheriff, in whose shire the debtor should be found, to *take his body* (if he were lay) *and safely keep him in prison* until he had agreed for the debt; and, within a quarter of a year after he was taken, his chattels should be delivered to him, so that by his own he might levy and pay the debt; and it should be lawful unto him, during the same quarter, to sell his lands and tenements for the discharge of his debts, and his sale should be good and effectual; and, if he did not agree within the quarter next after the quarter expired, *all the lands and goods of the debtor* should be delivered unto the merchant by *a reasonable extent,* to hold them until such time as the debt was wholly levied, and *nevertheless the body should remain in prison,* as before said; and the merchant should have such seisin in the lands delivered to him, that he might have a writ of novel disseisin and redisseisin, *as of freehold,* to hold to him and his assigns until the debt was paid; and, as soon as the debt was levied, the body of the debtor should be delivered with his lands, and the sheriff should return the writ; and if the sheriff return that, the debtor could not be found, or that he was a clerk, then the merchant should have writs to all the sheriffs where he had lands, to deliver to him all the goods and lands of the debtor, at a reasonable extent, to

hold unto him and his assigns in form aforesaid, and at last he might have a writ to take his body, if he were lay; and, after the lands were delivered to the merchant, the debtor might lawfully sell them, so that the merchant had no damage, and the *merchant should be always allowed for his damages, costs, labours, suits, delays and expenses*, and if the debtor found sureties, they should be liable in like manner; and the merchant should have seisin of all the lands that were in the hands of the debtor the day of the recognizance made, in whose hands soever they came after either, by feoffment or otherwise; and that if the debtor or his sureties died, the creditor might take the lands, but *not the body of the heir*.

A statute merchant, then, is a bond of record under the hand and seal of the debtor, authenticated by the king's seal, which renders it of so high a nature, that, on failure of payment on the day assigned, execution may be awarded, without any mesne process to summon the debtor, or the trouble or charges of bringing in proofs to convict him, and thus, it is presumed, it obtained the name of *a pocket judgment* (*a*).

The provisions of the act must be strictly attended to, for if the statute merchant varies from them in a material part, it will be void, and the party may be relieved in a writ of *auditâ querelâ* (*b*); but although void as a statute, it may be still good as an obligation, being under the seal of the debtor (*c*); but

(*a*) Bac. Ab. Execution, 689. (*b*) 2 Saund. 69 a. *note.*
(*c*) Hollingworth v. Ascue, Cro. Eliz. 355, 494,

the omission of an immaterial circumstance will not vitiate it, such as the omission of the day of payment, for then it shall be paid presently (*a*), or if the inrollment, &c. be written by the servant of the clerk, and not by the clerk himself (*b*), or the like.

The next remedy for the creditor was the *statute staple* (*c*). It was deemed advisable that certain towns should be appointed at which the staple of wool, leather, fells and lead should be holden, for the purpose of exportation by foreign merchants, and for that purpose the statute of the 27 Edw. 3. statute 2. was passed, called the "Statute of Staples," which made it felony for any English merchant to export the staple commodities of the realm; and, for the protection of the foreign merchant, it created the statute staple, that is, it authorized the *mayor of the staple* to take recognizances of debts made before him in *the presence* of the *constables* of the staple, or one of them, and *each staple* should have *a seal kept in the possession of the mayor under the seal of the constables*, and that *each obligation* made on such recognizances should be sealed *with the seal of the staple*, and the mayor might take the body of the debtor and commit him to prison, if found within the staple, until he made agreement for the debt and damages, and seize the goods of the debtor within the staple, and deliver them to the creditor on a true appraisement, or sell them and deliver the money to the creditor, and if the debtor was not within the staple,

(*a*) Sir W. Jones, 52 Bridg. 19. Winch. 82.
(*b*) Winch. 83. (*c*) 27 Edward 3. stat. 2.

nor goods to the amount of the debt, the same should be certified into Chancery, under the seal of the staple, on which a writ should issue to *take the body of the debtor and his lands, tenements and goods*, and the writ should be returned with the value of the lands and goods, and due execution should be made from day to day, in like manner as in the case of a statute merchant.

A statute staple, then, is a bond of record acknowledged before the mayor of the staple in the presence of the constables of the staple, or one of them, and the only seal required for its validity, is the seal of the staple, and therefore if the statute be void for any cause, it cannot, as in the case of a statute merchant, be proceeded on as a common obligation (*a*), and, wanting the sanction of the seal of the king, the sheriff, after the extent, cannot deliver the lands to the conusee, but must seize them into the king's hands, and in order to obtain possession of them, the conusee must sue out a writ of *liberate* (*b*), which is a writ out of Chancery, reciting the former writ, and commanding the sheriff to deliver to the conusee all the lands, tenements, and chattels by him taken into the king's hands, if the conusee will have them, by the extent and appraisement made thereof, until he be satisfied his debt (*c*).

The intent of the statute of 27 Edw. was to con-

(*a*) Bro. Stat. Merchant, 16. Mo. Pl. 1097. Ascue v. Hollingworth, *supra*. 2 Bac. Ab. 693.

(*b*) 2 Roll. Ab. 475. (*c*) 2 Saund. 70. c.

fine the remedy thereby given to transactions between merchant and merchant, concerning the merchandize of the same staple (*a*), but the remedy being found convenient, it was, by connivance, extended to cases not within the meaning of the law. To suppress this, and, at the same time, to give the creditor a security of a similar nature, the statute of the 23 Henry 8. cap. 6. authorized *the recognizance in the nature of a statute staple.* It prohibited the improper use of the statute staple, properly so called, but enabled the *Chief Justice of the King's Bench or Common Pleas,* and, *in their absence,* out of term, the *Mayor of the Staple of Westminster and the Recorder of London jointly* to take recognizances, and it prescribed the form of the recognizance, and that it should be sealed *with the seal of the debtor and of the king,* and *of the judge or persons before whom it was taken,* and should be enrolled in two rolls by the clerk of the recognizances, and one of the rolls should be kept by the justices, &c. and the other by the clerk, and should, at the request of the creditor, be certified into Chancery under the seal of the clerk, and the creditor should have the like process and remedy as in the case of *a statute staple.*

A recognizance, then, within the act of the 23 Henry 8. is in effect the same as the statute staple under the 27 Edw. except that it is acknowledged before different persons, and being under the seal of

(*a*) *Vide* Preamble to Statute 23 Henry 8. Cap. 6.

the debtor, it may, as well as the statute merchant, be used as a common obligation (*a*).

The process on a statute merchant differs from that on the statute staple, and the recognizance in nature of a statute staple in some important particulars. For if the conusor cannot be found within the staple, nor his goods to the value of the debt, the first process, under the two latter securities, after the certificate under the seal into Chancery, is to take body, lands and goods all in one writ, in which respect it is preferable to the statute merchant, under which, after it is certified into Chancery, the first process is a writ of *capias si laicus*, directed to the sheriff, commanding him to take the body of the defendant, if a layman, to satisfy the debt (*b*.) If the sheriff return upon the writ, that the party is dead, or not found in his bailiwick, the writ issues to extend the land (*c*). If the conusor be a clergyman, he cannot be arrested under the statute merchant, but the sheriff is in the first instance commanded to levy the debt of his moveable goods and chattels, by writ of *levari facias* (*d*).

These securities also differ in respect of the place of the return; for the writ of execution on the statute merchant is returnable in either bench, but upon the statute staple, the writ is returnable into Chancery (*e*): and the 23 Henry 8. cap. 6. which first brought

(*a*) Saund. 70. b. Bothomly v. Fairfax, 1 P. W. 335.
(*b*) Saund. 70. c. (*c*) Ibid.
(*d*) Ibid. (*e*) 2 Bac. Ab. 692.

in the recognizance in nature of a statute staple, referring in this to the same process and execution established by 27 Ed. 3. stat. 2. c. 9. on the staple, the law must be the same in both cases (*a*).

The writ of execution on a statute or recognizance, is a writ of extent or *extendi facias* against the body, lands and goods of the debtor (*b*), under which the sheriff must impannel a jury to extend the lands, as upon an elegit (*c*).

The conusee has this advantage over the judgment creditor, viz. he may issue out execution *at any time*, without a *scire facias*, or if the conusee die, his executor may sue out execution in like manner, and if the conusor be returned dead by the sheriff, the execution may, it seems, be taken out against his lands, without a *scire facias*, against his heir, or against the heir and terre tenants at the conusee's election (*d*); but, until actual entry, although after liberate returned, he has not an assignable interest (*e*), but only a possession in law, which he must perfect by entry, and a release by the conusee before execution of all his right and interest *in the land*, will not estop his subsequent execution (*f*), but, never-

(*a*) Co. Litt. 290. 2 Bac. Ab. 692.

(*b*) Tidd's Pract. 1031, 6th Edit. (*c*) 19 Vin. Ab. 557.

(*d*) 2 Inst. 471. Bro. Statute Merchant, 16. 43. 50. Bac. Ab. Execution, 694. *Scire facias*, 108. 2 Saund. 72. note.

(*e*) Hanman v. Woodford, 4 Mod. 48. 2 Salk. 563. 3 Lev. 312. Barrow v. Gray, Cro. Eliz. 552.

(*f*) Barrow v. Gray, *supra*.

theless, he may by proper words release *the execution* (*a*); legal possession of the land must, it seems, be obtained by ejectment (*b*).

Although the conusee may extend all the lands of the conusor, into whose hands soever they come (*c*), yet, so long as they remain in the possession of the conusor or his heirs, the conusee may, if he so think fit, extend a part only (*d*); but if the conusor has aliened the whole or part since the statute or recognizances, the case is altered; for if he has parted with the whole to different persons, and the conusee extend part only, the aggrieved party may compel all the alienees to contribute, by writ of *auditâ querelâ* (*e*), which sets aside the execution, and restores the party to the mesne profits, and compels the conusee to sue execution of all the lands (*f*). If the conusor has aliened part only of his lands, and the conusee extend all or part of the land sold, the party aggrieved shall also in such case have his writ of *auditâ querelâ* (*g*); but if the conusee had, in such instance, extended the lands only which remained in the hands of the conusor or his heirs, no writ of *auditâ querelâ* would lie, for neither he nor his heir could have contribution against his alienees (*h*).

(*a*) Bac. Ab. Exec. 707. Hyde v. Morley, Cro. Eliz. 40.
(*b*) 1 Vent. 41, 42. *Sed vide supra*, page 66.
(*c*) Harbert's case, 3 Co. 12. (*d*) Bac. Ab. Exec. 698.
(*e*) Bro. Stat. Mer. 49. 2 Inst. 396.
(*f*) Bac. Ab. Exec. 696. (*g*) 1 Roll. Ab. 311.
(*h*) Harbert's case, *supra*. 2 Roll. Ab. 472.

But as between co-heirs it is but fair they should contribute, a writ of *auditâ querelâ* for contribution will therefore lie (*a*).

The lands taken under a statute or recognizance, will, as in the case of an elegit, descend on the personal representatives of the conusee as chattel interests (*b*), and they are to be holden until the conusee has received his debts, and costs of suit and reasonable expenses, which the Chancellor shall assess, and, therefore, although the time of the statute is expired, the conusor is put to his *scire facias* before he can regain possession of his lands (*c*), in which respect these securities differ from an elegit, as already mentioned (*d*).

Lands purchased subsequently to the acknowledgment of the statute or recognizance, will, as in the case of a judgment, be bound by the lien (*e*), and as the statute was created for the benefit of merchandize, an alien merchant may, under a statute, extend the lands and hold them against the king (*f*).

The statute may be discharged before execution by cancelling, or by a defeazance or release, after which, if the conusee proceed to take out judgment, the conusor may sue out his writ of *auditâ querelâ* to set aside the execution. The statute is also discharged, if the conusee purchase part of the land in execution (*g*).

(*a*) Hob. 25. Co. Litt. 376.
(*b*) 1 Inst. 42. a. 2 Inst. 396.
(*c*) 4 Co. 67. 2 Roll Ab. 479.
(*d*) *Supra*, page 65.
(*e*) Bac. Ab. Exec. 693.
(*f*) Bac. Ab. Aliens. 138.
(*g*) Ibid. Exec. 705. 704.

In case of eviction, the conusee may have a writ of *scire facias*, and a new writ of execution, and in case of omission or error in the inquisition, he may have a writ of re-extent (*a*).

After the debt and costs are satisfied, the proper discharge is the entry of satisfaction on the record.

Several statutes have been enacted for the regulation and enrollment of statutes and recognizances. The statute of the 27 Eliz. c. 4. (*b*) has declared that the whole tenor and contents of all statutes merchant and statutes staple shall, within six months after they are acknowledged, be entered in the office of the clerk of recognizances taken according to the 23 Henry 8. c. 6. who shall enter the same in a book provided for that purpose, and kept by him; and if they are not brought within four months after they are acknowledged to the clerk for the purpose of being so entered, the statutes shall be void against subsequent purchasers for money or other good consideration. It will be observed, that this statute does not extend to recognizances in the nature of a statute staple.

By the statute of frauds (*c*) it is provided, " that the day of the month and year of the enrollment of recognizances shall be set down in the margin of the

(*a*) 1 Inst. 290. 32 Henry 8. c. 5. 8 Geo. 1. c. 25. sec. 4. *Vide infra.*

(*b*) 27 Eliz. c. 4. sec. 7 and 8.

(*c*) 29 Car. 2. c. 3. sec. 18.

roll where the recognizances are enrolled, and that no recognizance shall bind any land, tenements or hereditaments in the hands of any purchaser, *bonâ fide* and for valuable consideration, but from the time of such enrollment." And by a subsequent statute (*a*) it is enacted, "that the clerk of the recognizances in the nature of a statute staple, or his deputy, shall yearly from thenceforth prepare and keep three parchment rolls, as usual, and shall, at the times of acknowledging of every such recognizance, fairly write or ingross, instead of the heads or contents thereof, on the said rolls, the full tenor *in hæc verba* of every such recognizance, and that one of the said rolls shall contain all the recognizances to be taken before the Chief Justice of the King's Bench for the time being, and one other of them shall contain all the recognizances to be taken before the Chief Justice of the Court of Common Pleas for the time being, and the other of them shall contain all the recognizances before the mayor of the staple at Westminster, and recorder of London, for the time being; and that, at the time of every such acknowledgment, the respective persons before whom such recognizances shall be taken, and also the party and parties acknowledging the same, shall also sign their respective names to the roll or inrollment of every recognizance so taken, under the inrollment thereof, as well as sign and seal the same recognizance; and that all the said three rolls so signed shall, at the end of every year, be fixed together, and be thereby

(*a*) 8 Geo. 1. cap. 25.

made one roll as accustomed, and be and remain in the custody of the clerk of the recognizances, or his deputy, in his public office in London or Middlesex, who shall keep a docket to refer to the said roll or rolls, for the benefit of searches by purchasers and others (as used to be), to which docket also shall be added the day, month and year of every such acknowledgment; and that in case any loss or damage shall happen to any such recognizance, the same shall and may, from any of the said rolls so to be kept in the custody of the said clerk or his deputy, in order to have process thereon, be by him or them, by certificate under his or their seal, certified into Chancery, in like manner as recognizances by the said act of the 23 Henry 8. are directed, and as if the said recognizance had not been lost or damaged; and that to such certificate and all other certificates of such recognizances shall be annexed a true transcript of the entry of such recognizance, to be taken from the said roll or rolls in his or their custody; and further, that in case of any such loss or damage, a like certificate, with such transcript annexed as aforesaid, shall be made, and be left and remain with the clerk of the Petty Bag Office in Chancery, and shall be as good and effectual as if the said recognizance under seal had been left in the same office, as hath been used upon the issuing out of process in the same office; and that in order to prove such statutes and recognizances, in case of any loss or damage, a true copy or copies from the said roll or rolls, in the custody of the said clerk or his deputy, made and signed by the said clerk or his deputy, and duly proved, shall be deemed good evidence of

such recognizances, and be of the same validity to all intents and purposes, as if the said original recognizances were produced under seal; and that in case it shall at any time or times before or after the filing or returning of any liberate or liberates, sued out on any such extent or extents, be made appear to the Court of Chancery that sufficient has not been extended and levied, or sufficiently extended and levied to satisfy such recognizance, or that any omission, error or mistake has happened in making, suing out, executing or returning any of the said writs, or any process thereupon, or should it happen that any lands, tenements or hereditaments should thereafter be evicted from any person or persons who shall have extended the same by virtue of any such writ or process as aforesaid, that then, and in every such case, the said Court of Chancery shall and may award one or more re-extent or re-extents for the satisfying the same as aforesaid; and that writs of liberate or liberates may be sued out thereupon, any law or statute to the contrary thereof in any wise notwithstanding."

By the several registry acts (*a*), it is provided, that no judgment, statute or recognizance (other than such as shall be entered into in the name and upon the proper account of his Majesty) shall affect or bind any manors, lands, tenements or hereditaments in the counties of Middlesex and York, unless a memorandum of such judgment, statute or recognizance shall

(*a*) 5 Ann, cap. 18. 6 Ann, cap. 35. 7 Ann, cap. 20. 8 Geo. 2. cap. 6.

be entered at the register office, in manner therein directed. In Middlesex, judgments, &c. bind from the time they are memorialized. In the North Riding of York, any judgment registered within twenty days; and in the East and West Ridings, and in Kingston-upon-Hull, within thirty days after the day of acknowledgment is available, in like manner as if registered on the day it was acknowledged (*a*).

The process against the ecclesiastical profits of a beneficed clerk, is termed a *sequestration*. When a writ of execution is sued out against a beneficed clerk, if the sheriff return *nulla bona*, and that the defendant has no lay fee, a writ of *fieri* or *levari facias* issues to the bishop of the diocese wherein the benefice is, commanding him to levy the sum recovered of the ecclesiastical goods and chattels of the defendant. This writ is in the nature of a common *fieri facias*, and the bishop may seize and sell the profits of the benefice. Upon this writ, the bishop or his officer makes out a sequestration directed to the churchwardens, or (upon a proper security) to persons of the plaintiff's own appointment, requiring them to sequester the tithes and other profits of the benefice, which sequestration is to be forthwith published by reading it in church during divine service, and afterwards at the church door, and fixing a copy thereon, for, until publication, it has no priority over other sequestrations. This writ is a continuing writ, and the plaintiff is entitled to the growing profits from

(*a*) *Et vide* Sugden's V. and P. page 343, 3d edit.

time to time, though the writ has long been returnable; but if it be actually returned, the bishop's authority is at an end. The proper return to the bishop is *fieri* or *levari feci* (*a*).

It may be proper in this place to add a few words concerning debts due to the king.

Debts to the king are either of record or not of record.

Debts of record to the king are in the nature of a feudal charge, and bind the debtor's land in whose hands soever they come, from the time of his becoming in debt to the king (*b*). And the crown, by its prerogative, has preference in all cases in which the debt is prior on record to the judgment statute or recognizance of the subject, even although the lands have been actually delivered to the subject under the elegit or extent (*c*). If the judgment statute or recognizance of the subject be prior in date to the king's debt of record, yet, to give the subject priority, the lands must be actually delivered to him in satisfaction of his debt, for if the king's writ comes into the sheriff's hands whilst the lands are in the possession of the law, on the elegit or extent, and not actually delivered to the creditor, the

(*a*) Tidd's Pract. 1060, 6th Edit.

(*b*) 2 Roll. Ab. 156. (b) Pl. 1.

(*c*) Bac. Ab. Execution, 735. 2 Saund. 70. (e). Gilb. Hist. Exch. 88.

alteration of property is not complete, and the king's debt shall be first satisfied (*a*).

By the common law, the king could only take by matter of record, and, therefore, although by force of the prerogative of the crown, it was an incontrovertible rule, that in all cases where the king's and subject's titles concurred, the king's title should be preferred (*b*); yet, on all bond and simple contract debts due to the king, before an extent could issue, it was necessary the debt should be found by inquisition, after which it became a debt of record. To remedy this delay, so far as respected bond debts, the 33 H. 8. c. 39. sec. 50. enacted, that all obligations and specialties which should be made for any cause or causes touching or in any wise concerning the king's most royal majesty, or his heirs, or to his or their use, commodity, or behoof, should be made to his highness and his heirs, kings, in his or their name or names, by the words "to the lord the king," and to none other person or persons, to his use, and to be paid to his highness by these words "to be paid to the said lord the king, his heirs or executors," with other words used and accustomed in common obligations; and that all such obligations and specialties so to be made, should be good and effectual in the law to all purposes and intents, and shall be of the same nature, kind, quality, force and effect, to all intents and purposes, as the writings obligatory taken and acknowledged ac-

(*a*) Gilb. Exch. 91. (*b*) 16 East, 282.

cording to the *statute of the staple at Westminster.* had at any time theretofore been taken, used, exercised and executed against any lay person or persons. And the 53d section enacted, that all suits, process, judgments, decrees and executions thereafter to be taken, pursued or given for the king, in any of the king's Courts mentioned in that act, of or upon any of the same obligations, should be of the same or like strength, force, effect and intent in the law to all purposes, only against all and all manner of such person or persons as had been bound in such obligations or specialties, as well spiritual as temporal, and against their heirs, successors, executors and administrators, and every of them, and against none other, as writings obligatory taken and acknowledged according to the *statute of the staple at Westminster,* at any time before the making of that act had been used to be taken, exercised and executed against any lay person or persons; and by the 74th section it was further enacted, that if *any suit* should be commenced or taken, or any process be awarded for the king for the recovery of any of his debts, then the same suit or process should be preferred before the suit of any person or persons; and that the king, his heirs and successors, should have first execution against any defendant or defendants of and for his said debts, before any other person or persons, *so always that the king's suit were taken and commenced, or process awarded for the said debt at the king's suit, before judgment given for the said other person or persons.*

By force of the 50th and 53d sections of this sta-

tute, the king became enabled to proceed to execution on a bond executed to him, without a previous inquisition, and thus far the prerogative of the crown was *enlarged.*

On the intent of the 74th section, a great difference of opinion has been, and still is entertained. It seems admitted, that it is not to be confined to bond debts (*a*), and that it is restrictive on the old prerogative; but to what extent, is the doubt. A question has also been raised, whether it is to be held as extending to goods as well as lands. In an early case (*b*), it was considered that the ita quod, *so always*, made a condition precedent and a limitation, and it was decided, that a judgment and execution, *executed by elegit* before any suit or process, commenced by the king, should be preferred to the extent of the king, issuing on a bond debt, bearing date before the subject's judgment, and assigned to the king before the subject's execution. It does not appear what would have been the decision of the Court if the elegit had not been executed. In Uppom v. Sumner (*c*), decided in the Common Pleas, after much consideration, the judges of that Court unanimously decided, that the crown's extent came too late, after the defendant's *goods* were seized, in execution on a judgment at the suit

(*a*) *Supra*, page 94. Cecil's case, 7 Rep. 18.

(*b*) Attorney General v. Andrew, Hard. 23.

(*c*) Uppom v. Sumner, 2 Black. Rep. 1251. 1294. 4 Term. Rep. 413. *Et vide* 2 Com. Dig. 538. 648.

of a subject, *but before sale.* In Rorke v. Dayrell (*a*), the like point was unanimously decided by the judges of the King's Bench, although it was ably argued, that if the case of Uppom v. Sumner was law, the crown, so far from being in a better, was in a worse situation than the subject, which might be exemplified thus:—"It was clear the king was not bound by the statute of frauds, by which it was enacted, that no execution shall bind the property of the goods, but from the time of the delivery of the writ to the sheriff, and, therefore, with respect to the king, the common law still operated to bind the goods from the teste of the writ (*b*). Now if A. recover judgment against the king's debtor on the 1st of January, but do not deliver his writ of execution to the sheriff till the 4th, and B. also recover judgment against the same person on the 3d, and deliver his writ on the same day, and on the 2d an extent issue at the suit of the crown, according to the construction contended for, this absurdity would follow, that the king would not be preferred as against A., though he would as against B.; and yet it must be admitted, that B. is entitled to a preference against A."

The point afterwards came on to be argued in the Court of Exchequer (*c*), and was decided in favour of the crown. The Lord Chief Baron (Macdonald) in the course of his judgment, took an original view of the matter. His Lordship said,

(*a*) Rorke v. Dayrell, 4 T. R. 402. (*b*) Gilb. Exch. 90.
(*c*) Rex v. Allnutt, 16 East, 278.

" his apprehension was, that when the cases of Uppom v. Sumner and Rorke v. Dayrell were determined, it was not sufficiently considered how the law stood with respect to the prerogative of the crown, both in respect of the general preference which it claims to be entitled to for all its rights, and as to the particular prerogative in respect of execution for its debts. By the common law, the crown was entitled to *prior execution* for its debts; this does not mean preference as between two executions sued out, the one by the crown, the other by the subject; but the crown was to be first satisfied its debt, before the subject could *take out any execution at all.* The crown protected its debtor against all executions by the subject, till the crown's debt was paid. We have a writ of protection in the register, and Fitz. Nat. Brev. 28. B.; and notice is taken of this prerogative in Cr. Ly. and Madox; and this explains one of the cases cited in the King v. Cotton (*a*), where the king sent his writ out of Chancery to the justices of the C. B. commanding them to surcease execution in a suit between subject and subject, the defendant being his debtor, till the debt should be satisfied: which was considered as so much of course, that the plaintiff asked no more of the Court, than that the cause should be left on foot in Court by continuance on the roll, in order that when the king's debt should be satisfied, there should be an award of execution for him. Whether it may not be too critical to say, that there is a legal distinction between prior execution and preference in

(*a*) King v. Cotton. Parker, 123.

" execution, I am not quite sure; the language of 33 Henry 8th is, that the king's suit and process shall be preferred before the suit of any person, and that he shall have first execution. It is not that his execution shall be preferred, but that he shall have first execution, that is, he shall have execution before the subject shall be permitted to have his execution, which seems to have a pretty plain reference to this prerogative, which went to restrain the subject from taking any execution at all, till the crown's debt was satisfied. This prerogative was carried so high formerly, that an executor of one indebted to the king could not take probate, till the king's debt was paid or secured to him. Instances are vouched by Madox and the records of this Court, of Licences, stating the prerogative, and stating that the king's debt had been in some manner compounded for or secured. At this day, in the case of an execution, the king's suit and process is preferred, and he is entitled to prior execution in respect of all his debts upon record. The *diem clausit extremum* issues without waiting for an executor or administrator; and when there is an executor or administrator, in the administration of assets, it would be a *devastavit* in him, if he were to pay the debt of the subject before the crown's debt upon record. But it has been held, that since 33 Henry 8. there is the single case of execution upon a judgment, which they say is to be preferred to the king's debt by force of the statute. This appears to me to go a great way to shew what prerogative of the crown it was to which the statute applies; that it was to the prerogative of having first execution in the sense in which I have

"explained the words, and not to any prerogative which goes to determine the preference between two executions, one of the crown and the other of the subject, *subsisting* at the same time. This latter prerogative will be found to depend upon another principle perfectly distinct from this, and far more general; determining a preference in favour of the crown in all cases, and touching all rights of what kind soever, where the crown's and the subject's right concur, and so come into competition. I take it to be an incontrovertible rule of law, that where the king's and the subject's title concur, the king's shall be preferred. The books are full of instances to that effect. A great number are cited in the Attorney General v. Andrew, Hard. 24., and among these Stringfellow's case (*a*), which is the case of an execution; but there is a multitude of other cases which have nothing to do with executions. If 33 H. 8. had meant to have taken away or abridged this prerogative, it can hardly be imagined, that it would have controlled the effect of it in the particular instance of an execution, and left it to operate in its full force in the multitude of other cases to which it applies. That in the case of two executions subsisting at the same time, the crown's and the subject's title do concur, and that this is a different case from the case of a first execution, which supposes that to exist before the other, appears to be manifest, each derives under his execution a title to be satisfied his debt out of the effects of his debtor. Both executions are in force at some

(*a*) Stringfellow's case, Dyer 67. (b).

"one point of time before either is executed; the instant they thus concur, the king's prerogative to be preferred attaches. Stringfellow's case proves, that priority of teste and even part execution avail nothing; an imperfect and even barely inchoate title gives way to a title of the same nature in the crown whenever they are found to exist together. An execution executed by the subject alters the property, and there is then nothing left upon which the crown's execution can attach; in that case the crown's and the subject's title do not concur; but in the expressive language of Steel C. B. in the Attorney General v. Andrew, the subject's title is prior to the king's, and is executed. I observe that in the case of Rorke v. Dayrell, it seems to be assumed in a part of the argument, that as soon as the execution was begun to be executed, the property was altered, which to be sure would decide the question. I take that to be erroneous. The property is so far bound by delivery of the writ, that as between subject and subject the question of priority is determined; but as against the crown it is not bound at all; but I take it the property is in no sense and to no purpose in this world altered, either by delivery of the writ, or by the actual taking possession of the goods."

This disputed question has been recently very ably argued a second time in the Court of King's Bench, in a cause (*a*) in which the present Lord

(*a*) Thurston v. Mills, 16 East, 254.

Chief Justice was counsel, but which unfortunately went off on a different point; and here the matter now rests: The Profession may confidently expect it will not be long before this important question will receive a final decision.

By the 13 Eliz. cap. 4. it is enacted, that all the lands and hereditaments, which any accountant to the crown shall have within the time whilst he shall remain accountable, shall for the payment and satisfaction unto the Queen's Majesty, her heirs and successors, of his arrears, at any time thereafter to be lawfully (according to the law of the realm) adjudged and determined upon his account, be liable to the payment thereof, and be put and had in execution for such arrears, in like and in as large and beneficial a manner, to all intents and purposes, as if he had *the day he first became accountant*, stood bound by writing obligatory, having the effect of *a statute staple*, to her Majesty, her heirs or successors, for the true answering and payment of the same arrears. Consequently, the lands of an accountant to the crown are bound from the time the party enters into office (*a*); but the act does not extend to accountants whose yearly receipt does not exceed 300*l.*

Upon an extent in chief against the crown's debtor, if he be an accountant within the 13 Eliz., the writ directs an inquiry to be made with reference

(*a*) The case of the Chancellor, &c. of Oxford, 10 Rep. 55. 6. The Bishop of Bristow v. Coxhead, Mo. 257. Nicholls v. How, 2 Vern. 389.

to the period at which the lien attached, and at any time since. And the like, if the debt arise upon a bond put on the footing of a statute staple, within the 33 Henry 8. (*a*).

Although, generally speaking, the inrollment of a bargain and sale, under the 27 Henry 8. c. 16. relates to the time of its execution, so as to avoid all mesne acts of the bargainor; yet such relation does not take place on the bargain and sale by commissioners of bankruptcy of the bankrupt's real estate, and therefore the execution of the crown, if tested before the inrollment, finds the property still vested in the bankrupt, and consequently extendible (*b*).

As the crown is not bound by the statute of frauds, which directs that chattels shall be bound from the delivery of the writ of execution into the hands of the sheriff, the property of the king's debtor is bound from the day of the teste, although the writ were not delivered to the sheriff, or even sued out till long afterwards (*c*). Nor will the assignment of the commissioners of bankruptcy, as against the king, relate to the time of the bankruptcy, as it will between subject and subject (*d*); but if the

(*a*) Manning's Exch. 536. 7.

(*b*) Perry v. Bowers, Sir T. Jones, 196. 1 Vent. 360. 2 Shower, 156. Elliott v. Danby. 12 Mod. 3. Doe v. Mitchell. 2 M. and S. 446. Manning's Exch. 540.

(*c*) Manning's Exch. 544.

(*d*) Regina v. Arnold, 7 Vin. Ab. 104. Attorney General v. Hanbury, in Scacc. 2 Show. 481. Attorney General v. Capel, 2 Show. 480. Brassey v. Dawson, 2 Stra. 978. Manning's Exch. 544.

extent is tested on a day subsequently to the assignment, even to a provisional assignee, it will come too late (*a*), and it is said the crown cannot prove its debt under the commission (*b*).

Extents *in aid*, which, in some cases, were productive of considerable grievance, have been restricted in their operation by a recent salutary enactment (*c*), by which the sum to be levied under the extent in aid, is confined to the amount of debt actually due to the crown, if the debt due to the king's debtor exceeds the crown debt.

The baron's fiat is the true commencement of the king's suit (*d*).

(*a*) Drury v. Man, 1 Atk. 95. *et vide* 14 Ves. 87.
(*b*) 2 Stra. 752. Manning's Exch. 545.
(*c*) 57 Geo. 3. c. 117. (*d*) 2 Saund. 70. (f).

BOOK THE SECOND.

OF THE DIFFERENT SUBJECTS AND MODES OF MORTGAGE, AND ALSO OF THE TRANSFER OF MORTGAGE.

CHAPTER I.

Of the Subjects of Mortgage.

HAVING thus attempted to trace the progress of mortgages, from their origin at common law to their establishment with an equity of redemption, under the protection of the courts of equity; and having also treated of judgments, statutes and recognizances; we have next to consider the subjects and modes of mortgage.

The consideration of the *subjects* of mortgage we may briefly dismiss; for it may be laid down generally, that every species of property, real or personal, corporeal or incorporeal, moveable or immoveable, in possession, remainder, expectancy, or even in action, is the subject of mortgage. Manors lands and tenements, freehold, copyhold and leasehold; remainders or reversions, rents, franchises, advowsons, rectories impropriate, tythes, church livings, bills of lading, ships, freightage, ar-

ticles of merchandize, bills of exchange, debts, government annuities, title deeds, and even possibilities, may, according to their several natures, be conveyed, transferred, delivered or assigned, by way of mortgage security.

We shall, in the subsequent chapters of this book, consider the modes by which these different species of property may become the subject of mortgage, and also of the transfer of mortgages generally.

CHAPTER II.

Of Mortgages of Freeholds.

In its commencement, the form of the mortgage security was simple. The old *mortuum vadium* has been already described (*a*). The mortgage, which supplanted it, has been shewn (*b*) to have been a feoffment, with a condition contained in the same deed, or sometimes in a separate deed of defeasance (executed at the same time) to be void on payment of a given sum, at a given time. On performance of the condition, the mortgagor, as before shewn (*c*), was restored to his old estate, paramount all the charges and incumbrances of the feoffee.

The mortgage, by way of absolute conveyance, with the clause of redemption in a separate deed of defeasance, being liable to be made the means of fraud, was much discountenanced by the Courts. Lord Chancellor Talbot, in Cotterel v. Purchase (*d*), observes, "In the northern parts it is the custom in drawing mortgages to make an absolute deed, with a defeasance separate from it; but I think it a wrong way, and to me it will always appear with a face of fraud, for the defeasance may be lost, and then an absolute conveyance is set up. I would discourage the practice as much as possible."

(*a*) *Supra*, page 10. (*b*) *Supra*, page 11.
(*c*) *Supra*, page 12. (*d*) Cotterel v. Purchase, *supra*.

And in a case (*a*) in which lands were conveyed by an absolute deed of conveyance, and there was a separate agreement between the parties, that on the creditor being reimbursed what he advanced, and 50*l.* over for improvements, he should reconvey: the mortgagor died, leaving an infant son, who, within one year after he came of age, but twelve years after the transaction, filed his bill to redeem. Lord Chancellor Hardwicke said, "the not inserting the clause in the deed was an imposition on the mortgagor, but the reason was, that he was in distress, and therefore turned it into the shape of a purchase, but still he meant it as a security. Wherever the Court finds such a clause as this, it adheres to it strictly, to prevent the equity of redemption from being intangled to the prejudice of the mortgagor," and he decreed a redemption with costs against the mortgagee. In consequence of the discouragement it received, this mode of mortgage has become almost obsolete.

In some instances, the mortgage used to be effected by a demise and redemise, that is, the mortgagor demised the lands to the mortgagee for a long term of years, at a pepper-corn rent, and then the mortgagee redemised them at a pecuniary rent, which covered the interest of the money lent, and there was a condition in the original demise, that on payment of the mortgage debt and interest by a given day, the term should be at an end; upon

(*a*) Baker v. Wind, 1 Ves. 160.

which, the derivative term would also cease. This mode of mortgage is also nearly obsolete; but if an estate be in hand, and there is a wish to obtain a power of distress for payment of the interest of the mortgage debt, an underlease might be still advantageously resorted to. It would, however, it is apprehended, require the duty lately imposed on leases by the *55* Geo. 3. c. 184. to be paid as on a *bona fide* lease, and instead of an underlease, a practice now prevails, in cases where the estate is in hand, of conveying the lands to a trustee in fee, with a proviso authorizing him to distrain, if the lands shall be untenanted and fall into the mortgagor's possession, and the interest shall be in arrear for six months, with a further declaration, appointing the trustee the receiver during the time the lands shall be in lease. In other instances, the mortgagor gives a power of attorney to confess judgment in ejectment, in case the interest shall be in arrear (*a*), with a covenant to appoint such person a receiver as the mortgagee shall name, in case the lands shall be let.

Mortgages of freeholds, in modern practice, are either in fee or for such other interest as the mortgagor has in the lands, or by demise for a long term of years, attended with a condition in the same deed, that if the principal and interest be paid within a given time, the lands shall be reconveyed;

(*a*) For a precedent of a Power of Attorney of this sort, see Appendix, No. 1.

or the deeds of mortgage shall be void; or the term shall cease and determine (*a*). It has been already said (*b*), that if the former be the wording of the proviso, and the money be actually paid within the limited time, a reconveyance will nevertheless be necessary; but if the latter be the form, then, on payment of the money within the period mentioned in the condition, the estate of the mortgagee will *ipso facto* determine. If the mortgage be by term of years, a covenant is usually inserted on the part of the mortgagor, that, after default made, he, or his heirs, will at his own costs do all lawful acts for confirming the term, or, if required, for conveying the reversion in fee to such persons as the mortgagee, his executors, administrators or assigns shall direct; for otherwise the mortgagee would on foreclosure obtain a chattel interest only, and not the fee. The benefit resulting from the mortgage being in the first instance for a term of years, and not in fee, is, that the security and debt descend together; but if the mortgage be in fee, the land will descend to the heir as a trustee for the executor, and the debt vest in the executor, which, in case of the infancy or absence of the heir, creates inconvenience, and in a recent case in Ireland (*c*), Lord Redesdale said, he remembered a case in which the Court restrained the executor of the mortgagee from proceeding at law to compel payment of the debt on the bond, because the concurrence of the heir of the mortgagee in a reconveyance could not be obtained,

(*a*) For a Modern Precedent of Mortgage, see Appendix, No. 2.

(*b*) *Supra*, page 18.

(*c*) Schoole and Wife v. Sall. 1 Scho. and Lef. 177.

and the money was ordered into Court until the executor could find the heir.

An ingenious mode of mortgage has been suggested, in cases where two persons are advancing money at the same time on one estate, and preference is not wished to be given to either, and each is desirous of having a lien on the whole estate, and yet of avoiding the intervention of a mutual trustee, viz. limiting one moiety of the estate to one mortgagee for a long term of years, with remainder to the other mortgagee in fee, and the other moiety *vice versâ*. Thus each mortgagee is first mortgagee for a long term of years of one moiety, and second mortgagee in fee of the other moiety. Several conditions for redemption are inserted, with several covenants for title with each mortgagee (*a*).

(*a*) For a precedent of these conditions in mortgage, see Appendix, No. 3.

CHAPTER III.

Of Mortgages of Copyholds.

MORTGAGES of copyholds, on account of the peculiar nature of the tenure, retain in general their primitive form. They usually consist of a conditional surrender in the manor court by the mortgagor to the mortgagee and his heirs. By the condition, the surrender is made void, on payment by the mortgagor, &c. of principal and interest to the mortgagee, &c. on a given day; the condition is entered on the rolls, and immediately follows the surrender. The condition may, however, be contained in a separate deed of defeasance of even date with the surrender; but, as remarked by Mr. Watkins (*a*), this mode should never be resorted to, when it can be avoided; for the defeasance may be lost, and then, as the surrender is absolute on the rolls, the proof of the condition may be difficult, and besides the title to the lands should always appear on the records of the manor; and, therefore, even if a separate deed of defeasance be executed, it should be always entered on the rolls.

On performance of the condition, by payment of the money, the surrender is at an end, and the surrenderor is in possession *in statu quo*, without any readmission or fine (*b*).

(*a*) Watkins's Copyholds, Vol. i. page 116.
(*b*) Simonds v. Lawnd, Cro. Eliz. 239.

As well in the case of a conditional as of an absolute surrender, the surrenderor remains tenant to the lord until the admission of the surrenderee, so much so, that prior to the *55* Geo. 3. cap. 192. the mortgagor could not, after the conditional surrender, and before the admission of the surrenderee, devise the copyholds without a previcus surrender to the use of his will (*a*). If the surrenderee is admitted, and the condition is broken by the nonpayment of the money, his estate is absolute; and when the mortgage is paid off, a readmission and fine will be necessary, and the mortgagor will thereupon gain a new estate, and the descent be altered, so that if the lands had originally descended to him *ex parte maternâ*, they will afterwards descend as if he had taken by purchase (*b*).

Unless there is a special custom in the manor, by which the lord may compel a surrenderee to come in and be admitted, he cannot, it should seem, compel the mortgagee to be admitted, even after condition broken (*c*); but if there is such a custom in the manor, it seems he may compel him, and a Court of Equity will not give relief (*d*).

(*a*) Doe v. Wroot, 5 East, 130. Kenebel v. Scrafton, 8 Ves. Jun. 30.

(*b*) Benson v. Scott, 12 Mod. 49. Hannam v. Morgan, 7 T. R. 103.

(*c*) Basspool v. Long, 1 Roll. Ab. 568. Cro. Eliz. 879. 1 Show. 30. 83. King v. Dilliston, 1 Salk. 386. Carth. 41. Prec. in Ch. 573.

(*d*) Tredway v. Fotherley, 2 Vern. 367.

If the conditional surrenderee has not been admitted, the practice is, on payment of the money, for the mortgagee to give a warrant to the steward to vacate the surrender, and thereupon the surrender is at an end (*a*).

After the conditional surrenderee has been admitted, he becomes tenant to the lord, and the surrenderor may, before condition broken, release to him the benefit of the condition (*b*), and, after condition broken, he may release to him the equity of redemption; and no fine will in either case be necessary, for the mortgagee is already in possession, and on his admittance a fine has been already paid (*c*).

After condition broken, and before admittance, the mortgagee may file his bill to foreclose (*d*).

The equity of redemption may be of course mort-

(*a*) Mr. Watkins in his treatise on copyholds, (page 184, vol. i. 2nd edit.) says, in case the money is paid *within* the time prescribed by the condition, the surrenderee acknowledges the repayment and authorizes the steward to vacate the surrender; he afterwards adds, this formal mode is not necessary, for, on payment of the money within the prescribed time, the surrender is *ipso facto* void. It is suggested, this mode of vacating the surrender is more usually practised in cases in which the money is *not* paid within the time, on which it becomes necessary to authorize the steward to vacate the surrender, than in the instance put by Mr. Watkins. See Burgaine v. Spurling, Cro. Car. 283.

(*b*) Hull v. Sharbrook, Cro. Jac. 36. Kite v. Queinton, 4 Co. 25.

(*c*) Kite v. Queinton, *supra*.

(*d*) Sutton v. Stone, 2 Atk. 101.

gaged without surrender, and will pass by deed, being an equitable interest only; but if undisposed of, it will descend to the customary heir of the surrenderor, as the legal estate would have done (*a*).

As the mortgagor remains tenant to the lord until the admittance of the mortgagee, the copyhold will on his death descend on his customary heir (*b*), and a heriot will become due (*c*).

A surrenderee not being tenant until admittance, cannot in the mean time pass the lands by surrender (*d*), although he may make an equitable transfer of them. He may also devise the lands and they will pass in equity (*e*), but the devisee will not be entitled to admission as legal tenant, for a legal devise of copyholds cannot be made before admittance (*f*), and therefore although the devisee is admitted, the surrenderor or his heir will still remain tenant to the lord. But equity will consider the legal tenant to be a trustee for the devisee. The proper course to be pursued probably would be for the heir of the surrenderee to be admitted, and to make a surrender to the devisee. In a recent case (*g*), it was held that the devisee (who had been

(*a*) Fawcett v. Lowther, 2 Ves. 304.
(*b*) Frosel v. Welsh, Cro. Jac. 403.
(*c*) 2 Watkin's Copyhold, 158, 2nd Edit.
(*d*) Doe v. Tofield, 11 East, 246.
(*e*) Davie v. Beversham, 3 Ch. Rep. 2.
(*f*) Doe v. Tofield, *supra*.
(*g*) Doe v. Vernon, 7 East, 8.

admitted) of a devisee, who had died without admittance, could not maintain ejectment as the legal tenant.

So long as the transaction between the mortgagor and mortgagee rests in covenant, if the mortgagee assign his equitable interest by deed, and the mortgagor surrender to the assignee, he may compel the lord by mandamus to admit him without a double fine (*a*). The reader will observe that Mr. Watkins, in his treatise on copyholds (*b*), refers to this case, as an authority, that if a *surrenderee* before admittance assign by deed, the lord must admit the assignee without a double fine; but it will be seen the case applies to an assignment by a covenantee only, and not by a surrenderee.

If the mortgagor dies before the admittance of the mortgagee and a heriot is paid, and the mortgagee afterwards dies, and his heir claims to be admitted, Mr. Watkins (*c*) makes a query, whether, inasmuch as the admittance of the surrenderee or his heir always relates to the time of the surrender, so as to avoid all intermediate rights and interests contrary to the surrender, such as the free bench of the surrenderor's widow and the like (*d*), a heriot will

(*a*) Rex v. the Lord of the Manor of Hendon, 2 Term Rep. 484.

(*b*) Watkins on Copyhold, vol. 1. 161. 2nd Edit.

(*c*) Ibid. vol 2. 158. 2nd Edit.

(*d*) Benson v. Scott, 1 Salk. 185. Vaughan v. Atkins, 5 Burr. 2785.

not on such admittance become due, as if the surrenderee had died seised; and if so, whether the lord ought not to return the first heriot. Arguing from principle, it would seem that such would be the law, for after the admittance of the heir of the surrenderee, it would be difficult to contend that, *fictione juris*, the surrenderee died seised, so as to avoid the widow's free bench, &c. but not so as to give the lord a right to his heriot, and the law would scarcely permit the lord to hold both. But the case has not been decided.

From this doctrine of relation the surrenderee may, in ejectment after admittance, lay his demise in the interim between the admittance and surrender; and recover mesne profits from the time of the surrender (*a*).

The mortgagor may in the mean time, and until the admittance of the mortgagee, make a second surrender, which will be good if the first surrender is not perfected by admittance (*b*).

A surrender made by the mortgagee to the use of his will before admittance is void, and will not be made good by a subsequent admittance (*c*).

If the surrenderer is made out of Court, it is some-

(*a*) Holdfast v. Clapham, *supra*. Roe v. Hicks, 2 Wils. 15.
(*b*) Burgaine v. Spurling, 1 Term Rep. 601.
(*c*) Doe v. Tofield, *supra*.

times permitted to be vacated for want of a proper presentment, and a new surrender is taken (*a*).

In some instances the mortgage consists merely of the surrender and condition entered on the rolls; but more frequently there is a previous covenant to surrender, containing covenants for the title, and for payment of the money, which otherwise the mortgagee does not obtain.

(*a*) Fawcett v. Lowther, *supra*.

CHAPTER IV.

Of Mortgages of Leaseholds.

When leaseholds are made a mortgage security, it is usual, in order to avoid liability of the rent and covenants in the original lease, to take an underlease at a pepper-corn rent, reserving the last day, or a few days of the original term, and the mortgagor covenants to pay the rent and perform the covenants in the original lease. This precaution of an underlease should never be neglected, if the rent be heavy or the covenants burthensome; for otherwise, if the mortgagee enters into possession, he will become liable to all the covenants which run with the land (*a*); and even if he does not take possession, the better opinion is that he will equally become liable.

There is indeed a well known decision opposed to this latter position, viz. the case of Eaton and Jaques (*b*), which was tried before Mr. Justice Buller, at the sittings for Middlesex, in Trinity term, 1780, when the precise point appears for the first time to have been agitated in a Court *of law*, and on which a case was reserved for the opinion of the Court of King's Beneh.

It had been considered to be clear law by Lord

(*a*) Traherne v. Sadleir et al. 5 B. P. C. 179.
(*b*) Eaton v. Jaques, Doug. 438.

Chief Justice Holt (*a*), that on an *absolute assignment*, the estate vested in the assignee before entry; for which reason his Lordship seemed to think the ancient method of pleading "*virtute cujus*," the assignee entered and *was possessed*, was now disused; and in *equity* it had been received as undoubted law, that the same doctrine applied to a conditional assignment by way of mortgage. Thus in a case (*b*) where a lease had been granted with covenants to repair, and the lease had been assigned by way of mortgage, and the mortgagee had never entered; the houses being greatly out of repair, the lessor filed his bill against the assignee to compel him to discover whether the lease was not assigned to him, and for specific performance of the covenants. The Court said, it was the mortgagee's folly to take an assignment of the whole term, *and thereby subject himself to the covenants;* but as he was only a mortgagee not in possession, the Court would not assist the plaintiff to charge the defendant, or compel him to perform the covenants, but would leave him to his remedy at law. And in another case in equity (*c*), where a lease had been assigned by way of mortgage; but the mortgagee had never entered: the lessor recovered in an action at law against the mortgagee for rent; whereupon the mortgagee filed her bill for relief, but it was dismissed, *she being ill-advised to take an assignment of the whole term:* so that, in both the preceding cases, it was taken

(*a*) Cook v. Harris, 1 Lord Raymond, 367.
(*b*) Sparkes v. Smith, 2 Vern. 276.
(*c*) Pilkington v. Shaller, 2 Vern. 374.

for granted the mortgagee was liable, although not in possession, and, in the last case, the lessor as before stated, had actually recovered against the assignee in an action at law for the rent.

The Court of King's Bench, however, seemed to consider these cases as of little weight, and decided, that the mortgagee was not liable to be sued on the covenants, as he had not taken possession. The reasons given by Lord Mansfield for his judgment, shew to what an extent that able judge was inclined to carry into a Court of common law the principles of the civil law. He said, "to do justice between men, it is necessary to understand things as they really are, and to construe instruments according to the intention of the parties. Can we, he asked, shut our eyes and say it was an absolute conveyance? It was a mere security; it was not an assignment of *all* the mortgagor's estate, right, title, &c." In this Willes and Ashhurst, justices, coincided. But Mr. Justice Buller went further; after stating, that Lord Holt was mistaken as to the form of pleading, for he had looked into the precedents, and they always allege *virtute cujus*, the assignee entered and *was possessed*, he added, he did not agree that, *even if the assignment was absolute*, the action would lie without possession, and added, "there is no instance."

This judgment seems to have produced the case of Walker v. Reeves (*a*), which was heard in the

(*a*) Walker v. Reeves, Dougl. 445.

King's Bench, in Michaelmas Term, the 22 Geo. 3. and which was, in fact, the case of a mortgage security, although in the pleadings before the Court it appeared to be an absolute assignment. The question there was, whether an assignee of a lease, who had, before the rent became due, assigned the lease to one Biggs, who had never entered, was liable for the rent which had accrued due *since* the assignment. The defendant pleaded the assignment. The plaintiff replied that Biggs had not taken possession, and relied on Eaton v. Jaques. The counsel for the defendant insisted that the case of Eaton v. Jaques turned on the fact of its being a mortgage security, and urged, that none of the reasoning in that case was applicable to an absolute assignment. In this the Court coincided, and Lord Mansfield, in giving judgment, said, "By the assignment, the title and possessory right passed, and the assignee became possessed in law, and this case is by no means like Eaton v. Jaques, which, being a mortgage, was not an assignment for this purpose; it was a mere security." The reporter adds, that "if the plaintiff, instead of replying that Biggs did not take possession, had traversed by his replication the allegation of the plea, that the defendant had assigned *all* his estate, &c. and upon issue joined, it had appeared on the trial, that the assignment contained a proviso of redemption, it should seem he would have been entitled to a verdict on the authority of Eaton v. Jaques." Walker v. Reeves, therefore, put the judgment in Eaton v. Jaques on the true ground on which that decision was made, viz. that it was a mortgage secu-

rity, and totally over-ruled the doubt thrown out by Mr. Justice Buller, whether, on an absolute assignment, the estate vested in the assignee before entry.

The doctrine laid down in Eaton v. Jaques was again recognized in a case in the Court of King's Bench (*a*), and in a subsequent case in the Common Pleas (*b*). In the former of which cases the Court determined that a mortgagee of a ship, of which he was out of possession, could not be considered the owner so as to maintain an action at law for the freight; and in the latter case the Court decided, that a mortgagee so placed was not answerable for the goods furnished for the use of the ship. This former case was heard before three of the Judges who decided Eaton v. Jaques, namely, Mansfield, Ashhurst, and Buller, and the latter case before two of the Judges of the Common Pleas, namely, Heath and Wilson, the Chief Justice Loughborough and Mr. Justice Gould being absent.

Succeeding Judges, however, seem to have been little inclined to acquiesce in the authority of Eaton v. Jaques. More especially the learned Judge who immediately followed Lord Chief Justice Mansfield in the Court of King's Bench, and who was peculiarly well qualified, from his profound knowledge of the Common Law of England, to correct the equitable innovations of his predecessor, expressed his dis-

(*a*) Chinnery v. Blackburne, 1 H. Blackstone, 117, note.
(*b*) Jackson v. Vernon, ibid.

like of the doctrine. In the case of Westerdell v. Dale (*a*), which was argued in the Court of King's Bench in Trinity Term, 1797, Lord Kenyon said, "As to the cases respecting a mortgagee, whether in or out of possession, he is the legal owner, and must be so considered in a Court of Law, notwithstanding his title is subject to equitable interests. It is said in one of the cases, that a mortgagee is only liable when in possession, and that what proves this point is, that in charging the mortgagee it is necessary to state in pleading that he entered and was possessed; but with great deference to the learned Judge who gave that reason, I doubt it; I consider those as formal words."

The precise point afterwards arose in an action tried before his Lordship in Trinity Term, 39 George the Third, the particulars of which are stated in Woodfall's Landlord and Tenant (*b*). The original lessee of a term brought an action against a subassignee, to whom it had been assigned by way of mortgage, for the recovery of ground-rent paid by the original lessee in respect of the lease during the interest of the defendant as mortgagee.

In this instance Lord Kenyon is stated to have said, "the defendant is liable as assignee; his liability is not limited to his possession; but as long as

(*a*) Westerdell v. Dale, 7 Term Rep. 312.

(*b*) Stone v. Evans. Woodfall's Landlord and Tenant, 113, 2nd Edit. *et vide* Turner v. Richardson, 7 East, 340, note.

he had the legal estate, so long he continued liable to the covenants in the lease; if he wished to avoid that liability, he should have taken an underlease. As to the case of Eaton v. Jaques, he would overrule it without the least reluctance." And a verdict was given accordingly.

A more recent case has occurred (*a*), which may also be considered to be opposed in principle to the case of Eaton v. Jaques, although the Court in deciding it professed neither to impugn nor confirm that decision. In that case it appeared that one Denton had granted to the corporation of Carlisle, and their successors, so much of the river Caldew running through his lands, as would be sufficient for working certain mills, and had covenanted for himself, his heirs and assigns, against the obstruction of the water. He afterwards mortgaged the lands to one Wilson in fee, who never entered. After this, Denton died, having devised the lands to the defendants, against whom an action was brought by the corporation for breach of covenant, as assignee of all the estate and interest of Denton in the lands. The Court said, that whether a mortgagee before entry was liable or not, it was quite clear the devisees of an equitable estate (which was the only character that could be ascribed to the defendants on the record,) were not so; and judgment was given for the defendants.

Now it would seem to follow, as almost an inevi-

(*a*) Mayor of Carlisle and others v. Blamire, 8 East, 457.

table consequence, that if the devisee of an equity of redemption of a mortgaged estate, into which the mortgagee has never entered, has, in the eye of a Court of law, only an equitable estate, not recognizable at common law, that the mortgagee himself must at common law be considered the person liable to covenants, for otherwise the covenantee is without remedy as against the holder of the land.

To these cases may perhaps be added, the authority of the opinion of Lord Chancellor Thurlow, who within a few years after the decision in Eaton v. Jaques, decided a case in equity (*a*), in which, from the wording of his judgment, his lordship does not seem to have at all acquiesced in the doctrine laid down in Eaton v. Jaques. A lease had been granted with covenants for rebuilding, &c. This lease had been deposited by the lessee with a creditor to secure a debt. The executors of the lessor filed their bill against the depositary for a specific performance of the covenants to rebuild. The defendant in his answer admitted he was liable to the other covenants, but denied, he was bound to rebuild. The Lord Chancellor said, "it was no matter whether the defendant took the lease as a pledge or as a purchase; he could not take the estate and refuse the burthen; it was nothing to the lessor." And after refusing the prayer for specific performance, he decreed the defendant should execute an assignment to enable the plaintiff to bring an action at law. Lord Chancellor Thurlow therefore apparently could not have doubted, the

(*a*) Lucas v. Comerford, 1 Ves. Jun. 235.

mortgagee was liable to an action on the covenants before entry.

In a very recent case (*a*), the question has been again argued in Serjeants' Inn Hall before ten of the judges, and the authority of Eaton v. Jaques *expressly overruled.* It is therefore now clear, both on principle and sound authority, notwithstanding the case of Eaton v. Jaques, that if a mortgagee accepts an assignment of all the remaining interest in the term, he will be liable to the payment of the rent, and performance of the covenants in the original lease, so long as he shall be the legal owner of the lease, although he shall not take actual possession of the premises.

The reader will remark, that in the aforegoing cases of Sparkes v. Smith, and Pilkington v. Shaller (*b*), a Court of equity would not, on the one hand, assist the lessor on bill filed by him against the mortgagee for a discovery of the deed of assignment to him, and for a specific performance of the covenants, but left the lessor to his remedy at law; so neither would it on the other hand, after the lessor had obtained judgment against the mortgagee at law for the arrears of rent, give the mortgagee relief, although he had never been in possession; but in the case of Lucas v. Comerford, (*c*), the Court so far assisted the lessor as to decree the depositary of lease to execute an assignment to enable the lessor to bring his action against him at law.

It is decided, that if the mortgagee of a leasehold estate obtain a renewal of the lease, although there

(*a*) Williams v. Bosanquet, 1 Broderip and Bingham, 238.

(*b*) *Supra.* (*c*) *Supra.*

subsisted only a tenant right, the renewed lease will be held subject to the like equity as subsisted in the old lease, and will be redeemable accordingly (*a*); the mortgagee however is not bound to renew, and he will be entitled to his costs in effecting the renewal, with interest (*b*).

When *a renewable lease* is made the subject of mortgage, a covenant should be introduced on the part of the mortgagor, for concurring at his own expense in all lawful acts for obtaining a renewal, for otherwise the mortgagee cannot compel him to do it (*c*). And there should be added an agreement, that, if he refuses, it shall be lawful for the mortgagee to renew, and to charge the estate with the costs and interest (*d*); which additional charge certainly did not, prior to the last Stamp Act (*e*), and it is considered still does not, require an increased mortgage duty, notwithstanding the precise case is omitted in the exemptions to the Act; but it may be proper to guard against the consequences of the omission in the Act, by confining the additional charge to a certain amount.

(*a*) Holt v. Holt, 1 Ch. Ca. 190. Rakestraw v. Brewer, Select. Ca. in Ch. 55. Lee v. Vernon, 5 B. P. C. 10.

(*b*) Lacon v. Mertins, 3 Atk. 4. Godfrey v. Watson, Ibid. 518. Manlove v. Bale, 2 Vernon, 84.

(*c*) Lacon v. Mertins, *supra*.

(*d*) For a Precedent of such Covenant. See Appendix, No. 4.

(*e*) 55 Geo. 3. cap. 184, page 534, where the exemption from the mortgage duty, in respect of any further advantages, is confined to monies advanced for the insurance of the property from fire.

CHAPTER V.

Of Mortgages with Power of Sale.

It is now frequent in practice to give the mortgagee a power of sale over the estate, in case default is made in payment of the mortgage-money beyond a time limited. The modes of accomplishing this are various. In some instances, the estate is limited to the use of the mortgagee for a term of years, with the usual proviso for redemption, and subject thereto, to the use of trustees in fee upon trust to sell. In other instances it is limited at once to trustees in fee, in trust to sell if the money is not paid at a given day; and the proviso for redemption is also inserted. In other instances, it is limited to the mortgagee in fee, upon trust to sell if the money is not paid as in the preceding instance; and, in other instances, it is limited to the mortgagee in fee, with the usual proviso for redemption, attended with a declaration, that if default is made in payment at the given time, it shall be lawful for the mortgagee, his heirs or assigns, after notice in writing requiring payment, to sell, &c. To which it may be proper to add a proviso that such power of sale shall not prejudice his right of foreclosure. Either instance is valid and effectual, but the latter is most to be recommended; for, on breach of the proviso, it bestows on the mortgagee an absolute estate; and at the end of a further time gives him a power of sale; and leaves open to him the option, in the mean time, of filing his bill to foreclose.

Doubts were formerly entertained of the validity of an exercise of these powers of sale, without the concurrence of the mortgagor or the sanction of a Court of Equity (*a*), but they were groundless; a slight consideration will shew they are not within any of the mischiefs intended to be guarded against by the Courts of Equity, for they give nothing to the creditor beyond his principal, interest, and costs; they bestow on him no collateral or ulterior advantage; and they only enable him with promptitude to obtain payment of his mortgage debt.

The case of Croft v. Powell (*b*) was considered as raising considerable grounds for doubt (*c*); but so far from it, it will, on consideration, be seen to be rather an authority in favour of these powers. That case was as follows. In 1703, Rouse conveyed lands to Baldwin in fee, with a defeasance by way of mortgage, and it was agreed, that if the money was not paid by the appointed time, it should be lawful for Baldwin and his heirs to mortgage *or sell* the lands *free from redemption;* and out of the money raised by such mortgage or sale, retain the mortgage-money and interest, and be accountable for the overplus to Rouse and his heirs. Default was made in payment, and the lands were afterwards charged by Rouse with further sums of money to other persons. In the year 1716, Baldwin agreed to sell the lands to Gab. Powell for 4300*l.* and to warrant the same

(*a*) Powell on Mortgages, 1 vol. 14. 4th edit.
(*b*) Croft v. Powell, Comyn's Rep. 603.
(*c*) Powell on Mortgages, 1 vol. 14. 4th edit.

to him and his heirs, *except as thereinafter excepted, in which exception was contained the mortgage defeasance;* and accordingly by lease and release of the 25th and 26th March, 1716, Baldwin conveyed the lands to Powell in fee, and in the conveyance *the defeasance* was mentioned and *excepted*, and Baldwin covenanted that 4400*l.* was due to him on the mortgage. It further appeared that Rouse and wife had levied a fine of the premises to Baldwin, and that Baldwin had for some time before the sale been in possession, and had presented to a benefice belonging to the estate which had become vacant, and that Rouse was privy to the agreement for sale to Powell. It also appeared, that in 1719 Powell had filed his bill in the exchequer against Rouse and wife, praying to be quieted in possession, or that, *if* the estate was redeemable, Rouse might be decreed to redeem, or be foreclosed, on which Rouse filed his cross-bill to redeem, and Powell, in his answer to the cross-bill, insisted that the fine was levied by way of confirmation to Baldwin, who thereupon took upon himself to be absolute owner, and that the defeasance was noticed at Baldwin's request; but Powell admitted, that fearing he might be accountable to Rouse for the overplus, beyond what was due to Baldwin, he made Baldwin covenant that 4400*l.* was due, and he afterwards, on taking advice, retained 1300*l.* as an indemnity, and he offered to pay the 1300*l.*; and submitted, that Rouse or Baldwin should redeem. It does not seem that any further proceedings took place until 1729, when a bill for redemption was filed by a second mortgagee, and the daughter and heir of Rouse; and Powell insisted he had an absolute estate, not

redeemable under the power of sale, and cited Bonham v. Newcomb (*a*), (which was clearly not in point, and the decision on which is, in the argument in Croft v. Powell, placed on the wrong ground;) and insisted on the effect of the fine, and on Rouse's consent to the sale, and on more than twenty years' possession since the mortgage to Baldwin; and that the exception of the defeasance, and the covenant by Baldwin that 4400*l.* was due, was a prudent caution, since Baldwin might possibly be accountable for the overplus, if he had sold for more than was due to him. It was on the other hand argued, and so decided, that the estate was redeemable at any time while in the hands of Baldwin; *that though Baldwin had a power, on nonpayment of the money within the year, to mortgage or sell in order to raise the money lent, and to be accountable for the overplus, it was not then to be considered what he might have done, but what he had done, and it was manifest it was not Baldwin's intention to give Powell an absolute and indefeasible estate, for it was not conveyed to him absolutely, and free from the equity of redemption.* Besides, the bill filed by Powell in 1719, shewed he was conscious he had a redeemable estate, as also his retaining the 1300*l.* as an indemnity; that Baldwin presenting to the benefice would not help the case, for he had the legal estate, and had *at law* a right to present, and it did not appear but he might have presented on the nomination of Rouse; and that as to the fine it only confirmed the estate *in statu quo.* And lastly, that the length of time was in that case of little weight,

(*a*) *Supra.*

for that although Lord Nottingham did look upon the statute of limitations as a proper rule to determine the time of redemption, yet that had in many cases been varied from, and no certain rule in point of time had been fixed upon; and in the principal case the conveyance to Powell was in 1716, and he preferred his bill in 1719, and the bill by the present plaintiff was in 1729, so that twenty years had not elapsed; and redemption was decreed.

Now it is manifest that so far was the aforegoing case from raising considerable doubt of the validity of the powers for sale in question, that, on the contrary, *in express terms it admits their validity*, and the real question in Croft v. Powell was, whether it was a Sale or a Transfer; and it was manifestly the latter. The arguments drawn from the fine levied to Baldwin and his presentation to the benefice were untenable; and the exception of the defeasance, Baldwin's covenant for the amount of the mortgagee's debt, the reservation of the 1300*l.* and the bill filed by Powell, were unanswerable objections to the plea of its being an absolute purchase.

Consequently, had these powers for sale stood on no better authority than the case of Croft v. Powell, it may be thought there was little hazard in a reliance on them. They have since received two express judicial decisions in their favour; the first is the case of Clay v. Sharpe (*a*). War-

(*a*) Clay v. Sharpe not reported, Lib. Reg. Mich. 1802, Fol. 66. Sugden's V. and P. Appendix 20, 5th Edit. Cruise Dig. 2 vol. 105, 2nd Edit.

dell assigned leasehold premises to Day in trust for Sharpe, subject to redemption on retransfer of 2000*l.* stock, and it was agreed that if default was made in the retransfer, it should be lawful for Day to sell, and out of the purchase-monies reimburse himself his costs, and repurchase the 2000*l.* stock, and that he should pay the overplus to Wardell, *and Wardell covenanted to concur in the sale.* But it was provided that his concurrence should not be necessary to perfect the title, being intended only as a further satisfaction to the purchaser. Default being made in payment of the mortgage monies; Day, by Sharpe's directions, put up the mortgage premises for sale, and Clay became the purchaser. Clay's attorney prepared the assignment, and made Day, Sharpe, and Wardell parties. Wardell refused to execute, on which Clay filed his bill for specific performance against the three parties. Wardell in his answer alleged, that he resisted the sale as having been made without his consent and at an under value. He afterwards became bankrupt, and a supplementary bill was filed by Clay against his assignees. On hearing the cause, the Chancellor dismissed the plaintiff's bills as against Wardell and his assignees *with costs*, and decreed that the agreement entered into by the plaintiff with Day and Sharpe for purchase of the premises should be carried into execution, and on the plaintiff's paying to Sharpe and Day, the residue of the purchase-money, they should execute an assignment to the plaintiff, and that Sharpe and Day should pay the plaintiff's costs, so far as the bills were not dismissed.

The second is the case of Corder v. Morgan (*a*), in which the circumstances were almost precisely the same as in Clay v. Sharpe, at least so far as respected the language of the power for sale, and the bankruptcy of the mortgagor; but there was this difference between the cases, that in Clay v. Sharpe the purchaser was the plaintiff, and in Corder v. Morgan he was the defendant and the mortgagee the plaintiff. The defendant in the latter case submitted that the plaintiff was bound to procure the concurrence of the mortgagor and his assignees in the conveyance (*b*). The Master of the Rolls said, his opinion was, that the clause in the mortgage deed empowering the plaintiff to sell, whereby the mortgagor undertook to join in the conveyance, was a mere contract between the mortgagor and mortgagee, to the benefit of which, the defendant as a purchaser was not entitled; and there was nothing in the nature of the contract between the plaintiff and his mortgagor which prevented the latter giving, and the former exercising such a power of sale as that upon which the present question arose. He therefore decreed specific performance, but he did

(*a*) Corder v. Morgan, 18 Ves. Jun. 344.

(*b*) The defendant in this case seems to have relied on one of the arguments used in Croft v. Powell, (*supra*,) viz. "that it was inconceivable, if Powell had expected an absolute estate, that he would not have insisted on Rouse joining in the conveyance,"—and on an opinion expressed by Lord Kenyon, in the King v. the Inhabitants of Edington, 1 East, 288, that a Court of Equity would controul the exercise of a power of sale given to the mortgagee.

not think it a case for costs, as the case of Clay v. Sharpe was not in print.

These decisions have established the validity of these powers for sale: they also shew that the concurrence of the mortgagor cannot be required by a purchaser, although there be an express covenant on his part to join in the sale, and that a bill filed by a purchaser to compel the mortgagor to concur in the conveyance will be dismissed with costs; it may be also concluded from the case of Corder v. Morgan, that if a purchaser shall hereafter refuse to complete his sale by reason of the mortgagor not concurring in it, and a bill is filed against him by the mortgagee for specific performance, it will be decreed against him *with costs*.

CHAPTER VI.

Of Mortgages under Trust Terms, to raise Portions and Maintenance.

In all well drawn modern settlements and wills, where portions are intended to be provided, care is taken to express the time when the portions shall *vest*, the time when they shall be *payable*, and (if they are charged on real estate) the rate of interest they shall carry from the time they become *payable* until they are raised, with provisoes that the trustees may after the deaths of the tenants for life, or in their lifetime if they shall direct, raise any part of the portions for the advancement of the children, and shall after the deaths of the tenants for life, and until the portions are payable, raise certain sums for maintenance, not exceeding the amount of interest on the principal of the portion, and that the trustees shall not mortgage or sell until some one of the portions becomes payable. By these precautionary provisions, the questions which formerly so much perplexed the Courts in respect to the raising and payment of portions and maintenance rarely occur. But as the points may still arise under settlements and wills unskilfully penned, it will be proper to give the decided cases on this matter our consideration.

The doctrine to which we are about to advert was established on the principle of *convenience*, which is

not always the safest ground, on which to rest judicial decisions; and it is singular that in the instance now under our consideration, the doctrine which was originally grounded on convenience, contrary, in some instances, to the literal interpretation of the trust, was ultimately found in its application so extremely inconvenient and even ruinous to the estate, that later judges, although feeling themselves bound by the earlier decisions, have nevertheless taken advantage of apparently very trifling circumstances to free themselves from the difficulty.

The doctrine in question seems to be laid down with sufficient accuracy by Lord Chancellor Cowper, in Corbet v. Maidwell (*a*), that is, "first, that though a term is limited in remainder to commence after the death of the father, yet if the trust is to raise a portion *payable* at eighteen or day of marriage, without doubt the daughter shall not wait the death of her father, but at the age of eighteen or marriage may compel a sale of the term; secondly, so it is if the trust of a term for raising daughters' portions be limited to take effect, in case the father dies without issue male by his wife; and the wife die without issue male leaving a daughter; in such case the term is saleable in the life of the father."

The first of these propositions is supported by the case of Heyter v. Jones (*b*), which was decreed by

(*a*) Corbet v. Maidwell, 1 Salk, 159.
(*b*) Heyter v. Jones, 3 Rep. in Cha. 106.

the Lords Commissioners, the 14th November, 10 William 3., and afterwards affirmed by their Lordships, upon a rehearing, and ultimately affirmed on appeal to the House of Lords. Lands were limited to father and mother for their lives, and afterwards in trust that the trustees, after the decease of the parents, should out of the rents and profits, or by fines, raise 4000*l.* for the portions of younger children to be *paid* at 21, unless the next heir should within one year after the said portions became payable, pay or secure the same. The father died leaving issue a son and several younger children. One of the daughters attained 21 in her mother's lifetime; and it was decreed that she was entitled to her portion with interest from the time she attained 21 (*a*).

(*a*) This case is reported in Equity, Ca. Ab. Vol. I. 337. under the name of Hellier v. Jones, and it is there stated that the estate was limited to the father and mother for their lives, with remainder to their first and other sons in tail male, *with remainder* to trustees for 200 years upon trust *after the death of the father and mother*, out of the rents and profits to raise 4000*l.* for portions for younger children at their age of 21 years, unless the person in remainder should raise and pay the same; and that the term was ordered to be sold and the portions raised in the lifetime of the father and mother. If this be an accurate account of the limitations, the Court must have transposed the term of years and placed it prior to the limitation to the sons, which in fact seems to have been the intent from the circumstance of the raising of the portions not being made to depend on the contingency of a failure of issue male; so that the Court must have read the limitations as if they had run thus: to the father and mother for their lives, with remainder to trustees for 200 years upon trust, to raise portions for younger children, payable at 21, with remainder to first and other sons in tail male. The case however is very loosely stated both in Equity Ca. Ab. and in the Reports in Chancery.

The second of these propositions seems to have received judicial sanction for the first time in the case of Greaves v. Mattison (*a*), which was decided in a case at Common Law (*b*). An estate was settled on A. for life, with remainder to his sons successively in tail male, remainder to trustees for 40 years upon trust, *if A. should die without issue male of his body begotten on his wife*, then out of the rents and profits of the lands, or by demising, letting or setting the same, to raise portions for daughters, that is, if but one, 5000*l.*, and if two or more 6000*l.*, to be equally divided between them, and to be *paid* them respectively at 21 or *marriage*, with benefit of survivorship and with provision for maintenance in the meantime. The wife of A. died leaving two daughters and no son; one of the daughters died an infant; the surviving daughter married in the father's lifetime, and the question was, what portion she should have; and it was resolved by three of the judges, Pemberton, Dolben and Raymond, first, that the interest and right to the portions was *vested* in the daughters by the death of their mother without issue male, and should not wait the death of the father; secondly, that the trustees after the death of the mother, and in the life of the father, might have sold their interest in the term (although it could not take effect as to the possession of the lands to them or their vendee during the father's life) for raising the maintenance or payment of the portion, if any daughter should in the lifetime of the father attain to the age of 21, or be married; and

(*a*) Greaves v. Mattison, Sir T. Jones, 201.

(*b*) This question arose on an action of trespass, for taking away the plaintiff's daughter.

in their opinion the intent of the words should be taken to be, that after the death of the mother, the daughters should be provided with maintenance and portions certainly, and not wait the death of their father, who perhaps might marry another wife, (as here the father had done) and would not have such a respect for the daughters of the deceased wife as he ought, or he might live so long that the daughters would not have their portions to keep them in any competent time; and thirdly, that the interest of the portions being vested in the daughters by the mother's death, the two daughters by the express words of the deed ought to have 6000*l.* between them, and by as express words, by the death of one of them, the survivor was entitled to the whole 6000*l.* To this decision, Jones, Justice, did not assent, but gave his opinion that the right to the portions did not vest in the lifetime of the father, and that the 6000*l.* was not intended to be raised unless there were two daughters living at the father's death; and secondly, though he agreed the term might be sold in the father's lifetime, yet he thought that it was not intended by the parties that such a sale should be made; for the first intention was that the money should be raised out of the rents, issues and profits, which could not be done by the trustees during the father's life; and the execution of the trust as to demising, letting or setting seemed to be intended only when they should have power to take the rents, issues and profits; and as to the argument of the possibility of neglect by the father, and therefore the care of that was put in the hands of the trustees, he thought, if such had been intended, an express power ought to have been

given for such purpose, for the law would never suppose that the father, against the obligation of nature, would neglect to make a competent provision for his daughters, and therefore would not make a construction to compel him to it, of words expressing no such thing and against the proper sense of them. And he added, that another (*i. e.* different) construction would be too great an encouragement to disobedience in the daughters, and to ruin themselves by mean marriages: he therefore thought the surviving daughter entitled to *5000l.* only.

The arguments of the Court in this case have been rather diffusely stated, as the case forms the foundation of this branch of the doctrine in question, and the arguments advanced *pro et contra* were with no great variation or addition followed in the greater part of the subsequent cases.

There is also a case in Vernon's Reports heard before the Lord Keeper, in Hilary Term 1703, which is generally considered as a strong authority for the same doctrine (*a*). But the reference made by the editor of the last edition to the register's book, shews that this case was attended with such considerable evidence of intention, that the portions should be raised in the lifetime of the surviving parent, that it can hardly be considered an authority for the general doctrine we are referring to. The principal points in that case were; lands were settled on Sir Charles Gerrard for life, remainder to

(*a*) Gerrard v. Gerrard, 2 Vern. 458.

his wife for her jointure, remainder to the first and other sons of the marriage in tail; but if Sir Charles should die without issue male, having one or more daughters, then to trustees for 500 years in trust, by the rents and profits, or by mortgage to raise 5000*l.* if but one daughter, to be *paid* at 21 or marriage, which should first happen next after the decease of Sir Charles and wife, *or within six months after either of those days or times* (i. e. 21 *or marriage*), so as such daughter did not marry before eighteen without the consent of one of her *parents*, or grand parents, if any of them should be living; provided that if *Sir Charles* or any other person entitled to the inheritance, paid or secured the portion to such daughter *at the time aforesaid*, the term should be surrendered. Sir Charles died without issue male, leaving one daughter, who attained 21 in her mother's lifetime; and the question being whether the portion should be raised in the mother's lifetime, it was decreed accordingly, with interest, from the filing of the bill.

It will be observed, that in this case it was provided at the time of the settlement, that if *the father* paid the portion on the marriage, the term should cease. It might be therefore considered to be the intention of the parties that the portions should be then payable, or at least it was a fair inference united with the previous provision for the payment within six months after 21 or marriage with the consent of one of the *parents*.

The case of Staniforth v. Staniforth, heard in the same term before the Master of the Rolls, was how-

ever directly in point (*a*). In that case lands were limited to the father for life, remainder to the wife for life, and the heirs male of their bodies begotten; and if it should happen there should be no issue male of the marriage, and one or more daughter or daughters, then to trustees for five hundred years, from the decease of the survivor, upon trust by sale or mortgage, to raise portions; but no time was appointed for payment of them, nor was there any provision for maintenance. There was no issue male of the marriage, and the father died leaving only one daughter. On bill filed by the daughter, the Master of the Rolls declared, that by the consequence of the father's death without issue male, leaving a daughter, the term arose, though not to take effect in point of profits until after the death of the mother, and that the portion *vested* in the daughter in the lifetime of the mother; and that no time being appointed for the payment of portions, nor any maintenance in the mean time, she was entitled to a reasonable maintenance, not exceeding the interest of her portion, from the death of her father, or at least from such time as the portion might have been raised by a sale; and he accordingly decreed the portion to be raised by a sale, with a reasonable maintenance in the mean time.

Thus far the doctrine laid down in Greaves v. Mattison, seems to have proceeded without interruption; but it was discovered that the prejudicial

(*a*) Staniforth v. Staniforth. 2 Vern. 460.

consequences extended much beyond what was contemplated even by Jones in his objections to the decision in Greaves v. Mattison. For, if the portions were ordered to be raised by *sale* of the reversionary term, it was evident that the interests of the remainder-man, or reversioner might, in case the property was not of great value, be totally sacrificed to the raising of the portions, and even if the property was considerable, still the injury done to the estate might be to a very serious extent. If the portions were ordered to be raised by *mortgage* of the reversionary term, then the estate of the tenant for life must be encroached upon to satisfy the accruing interest of the mortgage, contrary to the intent, and, in many cases, the express wording of the settlement, or the only alternative was that the interest should run in arrear; and as in such latter case the mortgagee might file his bill in equity, and by procuring rests to be taken, convert interest into principal; it was clear that if the tenant for life lived many years, the interest might double or even treble the principal, and by such means prove the total ruin of the estate.

Evils so serious as these, led at length to a decided disapprobation of the rule laid down in the preceding cases, and Judges became anxious to discover circumstances which would justify them in departing from it. Thus, if a particular time is appointed for the raising of the portions, such as "*after the commencement of the term*" (*a*) or the like, that

(*a*) Butler v. Duncombe, *infra*.

circumstance has been held to *imply a negative*, that the portions should not be raised at any other time. It has been also held, that the circumstance of the maintenance being directed to be raised out of the rents and profits, after the term has fallen *into possession* (*a*), is sufficient to shew that the portion shall not be raised before that period, on the ground that the maintenance must precede the portion, and that it would be absurd to raise the portion first and the maintenance afterwards. The circumstance also of the settlement providing that the children should out of the premises receive a yearly sum for maintenance, and that the residue of the rents should *in the mean time* until the portions became payable, be received by the persons entitled to *the reversion* immediately expectant on the term, has been thought a sufficient indication of the intention to take the case out of the general rule (*b*).

Lord Hardwicke went so far (*c*) as to say, that the Court would lay hold of very small grounds to prevent the raising of the portions in the life of the father and mother, but Lord Talbot (*d*) thought it rather depended on the particular penning of the trust, and agreed with Lord Cowper, that if all the

(*a*) Brome v. Berkeley, *infra*.
(*b*) Stephens v. Dethick, *infra*.
(*c*) Stanley v. Stanley, 1 Atk. 549.
(*d*) Hebblethwaite v. Cartwright, Forrest 31.

contingencies had happened the portions must be raised. Lord Chancellor Eldon (*a*) has expressed his disapprobation of what fell from Lord Hardwicke, and has given his opinion that the proper rule is that which is stated by Lord Talbot, and that he did not think the Court ought *to be eager* to lay hold of circumstances, but should hold an equal mind while construing the instrument; the latter observation was made by his Lordship in answer to a remark of Lord Alvanley in Clinton v. Lord Seymour (*b*), viz. that the Court was expressly *eager* to lay hold of circumstances to shew it was not the intention of the parties that the portions should be raised out of the reversionary term. Lord Chancellor Eldon said, "the rule upon the whole depends upon this, whether it was the intention of the parties to the instrument, attending to the whole of it, that the portion should or should not be raised in this manner; taking it *primâ facie* to be the intention upon the general rule, if there is nothing more than a limitation to the parent for life, with a term to raise portions at the age of twenty-one or marriage, and the interests are vested, and the contingencies have happened, at which the portions are to be paid, the interest is payable and the portions must be raised in the only manner in which they can be raised, that is, by mortgage or sale of the reversionary term."

(*a*) Codrington v. Lord Foley, 6 Ves. Jun. 380.
(*b*) Clinton v. Seymour, 4 Ves. Jun. 440.

The following leading cases, which are briefly noticed in the order in which they occurred, will explain the circumstances under which the Courts thought themselves either bound by the rule or enabled to evade it.

The first instance in which a stand was made against the rule was by Lord Chancellor Cowper, in the before mentioned case of Corbett v. Maidwell.

In that case (*a*), after a limitation to the father for life, an estate was limited to trustees for 500 years upon trust, if the father should die without issue male by his then intended wife, and there should be one or more daughters of their two bodies, who should be *unmarried or not provided for at the time of his death*, such daughter, if but one, should have 2000*l.*, and 30*l. per annum issuing out of the profits*, till the portions should become due; the portion to be *payable* at 18 or day of marriage, and the trustees to raise it by sale or mortgage, or perception of profits. There was one child of the marriage, a daughter, who married the plaintiff, and after the mother's death the plaintiff and wife filed their bill to have the portion raised in the father's lifetime. The Lord Chancellor dismissed the bill, on the ground that all the contingencies had not happened, namely,

(*a*) Corbett v. Maidwell, Trinity Term, 9 Ann. 1 Salk. 158. 3 Rep. in Cha. 101.

that the child who could claim the portion must be a daughter *unmarried or unprovided for at the father's death;* and as to the 30*l.* maintenance, it must be intended in case the father should die without issue male, leaving a daughter under eighteen or not married; because otherwise this absurdity must follow, that the daughter must be paid maintenance money in the lifetime of the father, out of the profits of a term which was not to commence till after his death.

In the case of Savile v. Savile (*a*), which was heard before Lord Chancellor Parker, in Trinity Term, 1718, the principle laid down in Greaves v. Mattison was again in some degree acted upon; there an estate had been limited to the father for life, with remainder, to the intent that the widow might receive a jointure rent-charge for life and subject thereto, to trustees for 99 years, determinable on her death, in trust for securing the jointure, and thus charged, to the sons of the marriage in tail, with remainder to trustees for the term of 500 years, upon trust in default of issue male, to raise portions for daughters *payable* at 16 or marriage: the father died without issue male, and his Lordship decided that the term of 500 years took place in equity from the death of the father, and that the portions should be raised accordingly.

In this latter case, however, as the term of 99 years was limited for a particular purpose only, and extended only to *part* of the profits; the general doctrine was not strongly brought into question.

(*a*) Savile v. Savile, 1 Pr. Wms. 456.

In a subsequent case, his Lordship concurred with Lord Chancellor Cowper in expressing his disapprobation of the general rule (*a*). An estate was limited, in pursuance of articles, to the mother for life (the father being then dead, leaving issue one only child, a daughter) with remainder to trustees for 500 years upon trust, *from and after the commencement of the term*, by the rents and profits, or by demise, sale or mortgage, to raise 3000*l.* for the daughter's portion, *payable* at 21 or marriage; the Lord Chancellor held the words '*from the commencement of the term*' to signify commencement *in possession*, which *implied a negative* that it should be raised before; and that although the portion was directed to be paid at 21 or marriage, yet it was a rule in law and equity to construe the whole deed, so that every clause should have its effect, and he decreed that the portion in this case was vested, but should not carry interest till the term should commence, *for all interest was in default of payment.*

The case of Sandys v. Sandys, was heard before Lord Macclesfield, in Trinity Term, 1721 (*b*), in which the estate was limited (subject to preceding life estates in the husband and wife, and to a limitation to the issue male of the marriage,) to trustees for 500 years, upon trust by sale or mortgage, or out of

(*a*) Butler v. Duncombe, 1 Pr. Wms. 448.
(*b*) Sandys v. Sandys, 1 Pr. Wms. 707.

the rents and profits, to raise portions to be *paid* at 21 or marriage. One of the daughters (after her mother's death without issue male) having married, filed her bill in her father's lifetime to have her portion raised. The Lord Chancellor, after remarking that the selling or mortgaging reversions seemed a great hardship, being in effect to ruin a family for the raising of the daughters' portions, and therefore he would not go one step further than precedents should force—at length, *animo reluctante*, decreed the portion to be raised with interest from the marriage.

But his Lordship soon afterwards took occasion to shew how adverse he was to the general doctrine, and how willing to escape from it on any reasonable grounds (*a*). An estate was limited to the husband and wife successively for life, with remainder to the sons of the marriage in tail male, with remainder to trustees for a term of years, to commence on failure of issue male of the marriage, upon trust by the rents and profits, or by sale or mortgage, to raise portions for daughters to be *paid* at the age of 18 or marriage, or within as short a time after as *conveniently might be*; and for the maintenance of such daughters, and until their portions should be raised, a yearly sum was to be paid for maintenance payable half yearly, at Michaelmas and Lady-day, and the first payment to be made on such of the said feasts as should happen *next after the death of the father*, it

(*a*) Rerasby v. Newland, 2 Pr. Wms. 94.

being the intent of the parties that no such yearly maintenance should be paid during the father's life; with a proviso, that if the father should die without any daughter *living at his decease*, the term should be void; and power was reserved to the father, with the consent of the trustees, to revoke all the uses. The mother died, leaving one child, a daughter, who married the plaintiff, and with her husband filed her bill for raising the portion in her father's lifetime. The Lord Chancellor held the portion could not be *conveniently* raised in the father's lifetime; for by selling the reversion, the family might be inconvenienced to that degree as to ruin the estate; besides there was a proviso in the settlement, making the portion contingent during the father's lifetime, namely, if the father died without any daughter living at his decease, the portion was not to be raised; and the father had a power of revocation with the consent of the trustees, which suspended and prevented the portions from being payable; and he decreed the portion could not be raised during the father's life.

The case of Brome v. Berkeley, which was heard before Lord Chancellor King, with the assistance of the Master of the Rolls, is particularly worthy of attention (*a*): The estate was limited to father and mother for life, and to their sons in tail male, with remainder to trustees in fee upon trust, if there should be no son of the marriage, or being

(*a*) Brome v. Berkeley, 2 Pr. Wms. 484.

such, if all should die under 21 without issue, then out of the rents and profits, or by sale or leasing, or otherwise, to raise portions for the daughters of the marriage, payable at 21 or marriage; and also to raise a certain yearly sum, by half yearly payments, for their maintenance and education; the *first payment* of the maintenance money to be made at such of the half yearly feasts as should happen next after the said estate so limited to the trustees should take effect *in possession.* There was one child of the marriage, a daughter, who after the death of her father, having attained 21, filed her bill in her mother's lifetime against the trustees for raising the portion with interest from the time the same became payable. The Master of the Rolls, after admitting that if a reversionary term or estate be limited to trustees to raise portions at a certain time, when that time comes the portion must be raised, unless in the declaration of the trust of the term the intention of the parties appears to the contrary; said, that in the principal case such intention was plain, for in that case *the maintenance* for the daughter was not to be paid until the trust estate came *into possession,* and the payment of maintenance must be intended to *precede* the payment of the portion; the maintenance must determine when the portion becomes payable: In this opinion the Lord Chancellor coincided, adding, that it was absurd to say the portions should be raised first and the maintenance money paid afterwards. The bill was accordingly dismissed, and the decree affirmed in the House of Lords.

In a subsequent case (*a*), Lord Chancellor King considered himself bound by the general rule. In that case the estate was limited to Sir George Rivers for life, with remainder to Dame Dorothy his wife for her jointure, with remainder to the first and other sons of the marriage in tail male, with remainder to trustees for 500 years upon trust in default of issue male of the marriage, out of the rents and profits after the commencement of the term, or by demising, selling, mortgaging or otherwise disposing of the premises, when, and in such manner as the trustees should think fit, to levy and raise the sums after mentioned, for the portions and maintenance of daughters, if one only should attain the age of 19 or marry, 4000*l.*; if two, 5000*l.*; if three or more, 6000*l.* to be equally divided between them, with certain yearly sums for their maintenance and education from the death of Sir George *or* Dame Dorothy, which should first happen, till such portions should be paid, and the portions to be *paid* to the daughters at 21 or marriage, or as soon after as they could be raised, and the said yearly sums for maintenance to be paid from the death of Sir George *or* Dame Dorothy, which should first happen, till the portions became payable, with a provision, that if Sir George survived his wife, and sufficiently maintained his daughters to the approbation of the trustees until they attained the age of 14, no maintenance should be raised until that time, and with a proviso, that the power given to the trustees of selling or mortgaging should not prejudice the life

(*a*) Goodal v. Rivers, Mosely Rep. 395.

estate of the wife, which latter proviso, the Solicitor General afterwards in his argument observed, arose from abundant caution. Dame Dorothy died in the lifetime of Sir George, leaving issue two sons and several daughters. The two sons afterwards died without issue: at the time of the death of the surviving son, all the daughters had attained to the age of 19. The daughters after this filed their bill against their father and the trustees to have their portions raised by sale of the term, with interest from the death of their last surviving brother. It was argued by the Attorney and Solicitor General for the plaintiffs, that this case was distinguished from that of Brome and Berkeley, inasmuch as in the present case the maintenance was to be raised after the death of either father or mother, until the daughters attained 19 or marriage, and therefore was not within the objection made in the former case, namely, that the portions would precede the maintenance; nor was it within the case of Butler v. Duncombe, because in that case the words "*after the commencement of the term*" introduced the declaration of the trust, but in the present case "*the failure of the issue male*" introduced the trust. In this the Lord Chancellor coincided, and he held that the words, "*when and in such manner*," (which it had been urged for the defendant gave a great latitude to the trustees, and left the convenience of time to them) only signifying that the estate should be sold either together or in parcels as the trustees should think fit; and he decreed that the portions should be raised with interest from the death of the surviving brother by sale of the reversion.

In Hebblethwaite v. Cartwright (*a*), Lord Chancellor Talbot placed the doctrine entirely on the ground of *apparent intention* and on the particular penning of the trust; which ground has been since strongly approved of by Lord Chancellor Eldon, as before remarked. In that case an estate was limited to A. for life, remainder to his first and other sons by B. his wife, in tail male, remainder to trustees for 1000 years upon trust, if there should be no issue male of the marriage who should live to attain 21 or be married and have issue, then out of the rents and profits, *or* by sale or mortgage, to raise portions for daughters, to be divided between them at 21 or marriage, and a yearly sum for maintenance in the mean time; with a proviso, that if the father or the remainder-man should advance them in marriage with portions equivalent, or there should be no daughter who should attain 21 or be married, then the term to cease. The wife died without issue male, leaving three daughters. One question made in the cause was, whether under the trusts of the term, the portions were to be raised in their father's lifetime; and in support of the negative, it was ingeniously urged that the option given to the trustees of raising the portions out of the rents and profits, *or* by sale or mortgage, required that the death of the father should precede the raising of the portions. But the Lord Chancellor held, that since they had both powers, they might use that which best suited the interest of the daughters; nor did he conceive the proviso respecting advancement

(*a*) Hebblethwaite v. Cartwright, For. 30. Easter Term, 1734.

any evidence of intention to postpone the raising of the portions; and he decreed the portions to be raised, with interest from the mother's death, at which time they first vested.

The case of Stanley v. Stanley, heard before Lord Chancellor Hardwicke (*a*), is very briefly reported, and the grounds of the decision are not mentioned. But it seems that his Lordship, after stating the general rule, decided against the claim of the daughters to have their portions raised in the lifetime of their parent.

In Hall v. Carter (*b*), heard before Lord Hardwicke in July, 1742, the Lord Chancellor maintained the general doctrine. In that case an estate stood limited (subject to the widow's jointure) to trustees for 100 years upon trust, out of the rents or profits, or by mortgage to raise portions for daughters at 18 or marriage, and to pay to every daughter 6*l.* for maintenance. The like argument was used in this case as in Hebblethwaite v. Cartwright, viz. that the option vested in the trustees of raising the portions either out of the rents and profits *or* by mortgage, evinced the intention that they should not exercise their election until the term came into *possession;* and it was also contended, that the raising of maintenances out of the rents and profits, brought it within the case of Brome v. Berkeley.

(*a*) Stanley v. Stanley, 1 Atk. 548.
(*b*) Hall v. Carter, 2 Atk. 355.

As to the first objection, viz. the right of election, the Lord Chancellor held they should not be allowed to postpone the raising of the portions in order to make their election; and as to the second objection, he distinguished the case of Brome v. Berkeley, by observing that in the latter case the daughters were not to have maintenance until the term came into possession, while in the principal case the maintenance was *a subsisting charge*, the arrears of which must be paid when the estate came into possession. And he decreed accordingly, and that the portions should carry interest from the time they became due.

In a subsequent case, however (*a*), Lord Hardwicke thought himself justified in departing from the general rule. An estate was settled upon parents for life, and to their sons in tail male, with remainder to trustees for a term of years to raise portions for daughters, to be paid at 21 or marriage; and the daughters out of the premises to have such yearly maintenance as should be suitable to their degree and quality, and the residues of such yearly rents, above such yearly maintenance *in the mean time* till the portions become payable, to be received by such persons as should be entitled to the reversion immediately expectant on the determination of the term. The Lord Chancellor applied the case of Brome v. Berkeley to the principal case, and dismissed the bill.

(*a*) Stevens v. Dethick, 3 Atk. 39.

Notwithstanding the doctrine laid down in Brome v. Berkeley, that the *maintenance* must determine when the portions shall become payable, Lord Hardwicke in Lyon v. Chandos (*a*) determined, that the payment of maintenance could not operate to postpone the raising of the portions in the face of a clear and express declaration. And therefore in that case, although the maintenance was directed not to be raised, until *after the death of the Duke of Chandos*, yet as the raising of the portions was expressly declared to be "at 21 or marriage, the Marquis of Carnarvon being dead," he refused to admit the implication arising from the time of the commencement of the maintenance against the absolute and clear declaration of the time for payment of the portions, and directed them to be raised with interest from the death of the Marquis. And although the Master of the Rolls in Clinton v. Seymour (*b*) is reported to have considered the order for payment of interest from the death of the Marquis singular, as the maintenance could not be raised until the death of the Duke; yet it is apprehended the decree was in consistency with the preceding decisions, which directed *interest* to be raised from the time the portion became payable, without reference to the raising of maintenance.

The case of Churchman v. Harvey, heard before Lords Commissioners Willes and Wilmot (*c*), was the

(*a*) Lyon v. Chandos, 3 Atk. 416.

(*b*) Clinton v. Seymour, 4 Vesey, Jun. 464.

(*c*) Churchman v. Harvey, Amb. 335.

same in effect as Butler v. Duncombe, the language of the trust being that the trustees should at any time from and after the *commencement of the term in possession* raise the portions; and was decided in like manner.

In Smith v. Evans, heard before Lord Chancellor Northington in Michaelmas term 1766(*a*), the estate was settled to the father and mother and their issue male in strict settlement, with remainder to trustees for a term of years, upon trust if the father should die without issue male and leaving one or more daughters living at his death, then to raise portions by leasing, assigning, or mortgaging. The father died without issue male, leaving his widow and two daughters who filed their bill to have their portions raised in their mother's lifetime. It is singular that his Lordship in giving judgment should incline to favour the general rule before alluded to, and to disapprove of the reasons which induced the Court to make the decisions which are exceptions to it, saying that the inconvenience of a younger child starving for want of his portion was as great as the injuring of the estate of the eldest son by raising the portion out of the reversion; and it being urged that by leasing was meant at rack rent, and therefore the case resembled the case of Brome v. Berkeley, he declared he could not understand it in that sense, and would not construe it so unless he was compelled; it meant leasing upon fine, and he decreed the portion to be raised with interest from the filing of the bill.

(*a*) Smith v. Evans, Amb. 633.

The case of Conway v. Conway was heard before Lord Chancellor Thurlow (*a*), and is an extraordinary judgment. It has been shewn that by the preceding cases the general rule is, that the portions when they are *vested*, and are directed to be *paid* at a given time, shall be raiseable out of a reversionary term, unless an intention is shewn that the payment shall be postponed until the term comes into possession; and that the evidence of such an intention is an exception to the rule. But in Conway v. Conway, the Lord Chancellor is made exactly to reverse the rule, and to say that when a man gives portions charged on a term to arise on the death of a party, it shews that they are not to be paid till after the death of the party; and that though they are directed to be paid upon attaining 21 or marriage, yet it can only be when the term shall come into existence; but that such an intention could not be raised against express declaration.

In Codrington v. Lord Foley (*b*), Lord Eldon, after noticing this reported judgment of Lord Thurlow, said, that upon looking at his own brief in that cause, and to other cases, he was satisfied Lord Thurlow never did express himself in the words there attributed to him; and he adds, that doctrine is directly contrary to that of Lord Cowper, Lord Hardwicke, and what all the cases, whether proceeding upon sufficient circumstances denoting intention or not, do in effect say, that there must be some cir-

(*a*) Conway v. Conway, 3 B. C. C. 267.
(*b*) Codrington v. Lord Foley, *supra*.

cumstances in the will or settlement denoting the intention to take the case out of the general rule, which is, that the portions shall be raised at the days or times limited, unless the will or settlement contain circumstances indicating an intention that they are not to be raised at those days or times.

The modern case of Codrington v. Lord Foley remains to be noticed, which was heard before Lord Chancellor Eldon (*a*), and which was briefly as follows: —Lord Foley, by his will, devised certain estates to trustees for 99 years, with remainder to Thomas, afterwards Lord Foley, for life, remainder to trustees during his life to preserve contingent remainders, remainder to other trustees for 100 years, for raising a jointure for any wife of Thomas Lord Foley, with remainder to other trustees for 1000 years upon trust, to raise 30,000*l.* for portions for younger children, as Thomas Lord Foley should appoint; and in default of appointment, to be equally divided between them if more than one, share and share alike, with remainders over; and he devised other estates to trustees for 101 years; and subject thereto to uses in favour of his second son Edward, and his issue; and he declared the trusts of the term of 99 years, and 101 years, to be, that the trustees should out of the rents and by the sale of timber allow for the use of his sons Thomas and Edward, any sum not exceeding 6000*l.* a year, until such of their debts as were then provided for, and should be due at his decease should be discharged;

(*a*) Codrington v. Lord Foley, *supra.*

and in the next place, to discharge a mortgage and certain other debts of his two sons, and after the decease of his sons and payment of the debts, &c. to attend the inheritance. Thomas Lord Foley died in 1793, leaving one son and one daughter, who, in 1796, married Christopher Codrington, Esq. The bill was filed by Mr. and Mrs. Codrington and their infant children, against Lord Foley then an infant, and the then trustees of the term of 1000 years, praying an account of principal and interest, and that the same might be raised; it was objected that the trusts of the term of 99 years remained to be performed; and a cross bill was filed which prayed that the trusts of the terms of 99 years and 101 years should be satisfied before those of the term of 1000 years should be executed. The Lord Chancellor, after stating, as before mentioned, that the rule depends upon this, whether the parties to the instrument, attending to the whole of it, intended that the portions should or should not be raised, distinguished the principal case from all the preceding cases, viz. that this was not attempted to be *raised with any prejudice to the life estate of the parent* (*a*), and he decreed that the plaintiff was entitled to have the portion raised with in-

(*a*) It would not seem from the preceding cases, that the raising of the portion by mortgage or sale of the reversionary term prejudiced the life estate of the parent; the prejudice was in fact to the estate of the remainder-man, by the accumulation of interest upon interest. In Hall v. Carter, *supra*, Lord Hardwicke is reported to have said, that in more modern cases, the Court has thought it very hard in the lifetime of the father to encumber his estate with raising daughters' portions; but he immediately afterwards remarks, that the estate of the *jointress* could not be affected by the

terest at 4*l. per cent.* from the marriage to the filing of the bill, and interest at 5 *per cent.* from the filing of the bill, but gave no costs.

Having thus gone through the leading cases on this head, it remains to be noticed, that if, as is usual in modern settlements, the trusts are by sale or mortgage to raise the portions after the parent's death, or in his lifetime, if he shall so direct; and if the parent is willing that the portion shall be raised by mortgage *in his lifetime*; or if the term has fallen into possession; the usual mode of raising the portion is, that the child shall assign to the mortgagee his share of the sums to be raised, and give the mortgagee a power of attorney to receive it. Then the tenant for life, if the term is reversionary, makes a demise of a proportional part of the estate to the mortgagee for 99 years, if the tenant for life shall so long live, upon trust to permit the tenant for life to receive the rents until default is made in payment of the interest, and then to receive the rents and retain the interest. The trustees of the term assign a proportional part of the premises comprized in the term to the mortgagee, and there is introduced a proviso for redemption by the tenant for life, or persons in remainder, on payment of the portion and costs, &c. The tenant for life, or (if the term is in possession) the remainder-man (if he will concur) covenants for the payment of the money and for the title.

the mortgage of a reversionary term. These observations would tend to infer that a distinction has been taken between the cases of the father being tenant for life and any other person. But the author has not been able to discover an authority for it.

Where an annual sum is directed to be raised for *maintenance*, and there is an existing life estate, and it is not clearly expressed, that the maintenance is not to commence until after the determination of that estate, the question of intention arises as in the case of the portion itself. If it is ascertained to be the intention that the maintenance shall commence notwithstanding the life estate, but the payment of it is clearly confined to be out of *annual profits*, it must from necessity either encroach on the life estate, or run in arrear; the former can never be considered the intention as the term is reversionary to the estate; the maintenance must therefore run in arrear, and when the trust term falls into possession all the arrears must be paid (*a*). If the trusts for raising the portion and maintenance are extended to *sale or mortgage*, it was for some time considered doubtful whether the Court would raise the *maintenance* by way of mortgage, for it is manifest there is some difficulty in accomplishing it, inasmuch as the maintenance is a running sum becoming due quarterly or half yearly; and in Pierpoint v. Lord Cheney (*b*), Lord Chancellor Parker said he had not been enabled to find a single precedent for mortgaging a reversion for maintenance; but in the subsequent case of Ravenhill v. Dansey (*c*), Lord Chancellor Macclesfield considered it clear, that when the child had no other maintenance, it

(*a*) Ravenhill v. Dansey, 2 P. Wms. 179.
(*b*) 1 P. Wms. 483.
(*c*) *Ubi supra.*

had been decreed to be raised by mortgage of the reversionary interest of a term; and in a very recent case (*a*) the Master of the Rolls admitted the maintenance might, if necessary, be raised by sale or mortgage (*a*).

In a case heard before Lord Alvanley (*b*), an estate was limited to the use of the Duke of Newcastle for life, with the remainder to trustees for 1000 years, with remainder to the Earl of Lincoln for life; and the trusts of the term of 1000 years, were by mortgage or sale, or out of the rents and profits to raise 15000*l.*, for an only daughter payable at such time as the Earl should appoint; and in default of appointment, to be a vested interest at 21 or marriage, but not to be *payable till after the death of the survivor of the Duke and Earl*, and to carry interest at 4*l. per cent.* from the death of the survivor, and there was a proviso that no sale or mortgage should be made until some one of the portions became payable, and upon further trust *after the death of the Earl*, to raise by all or any of the ways and means aforesaid, for the maintenance of the younger children until their portions should be payable, such yearly sums not exceeding the interest of the portions, as the Earl should appoint; and in default of such appointment, then such yearly sums as would be equivalent to the interest by quarterly payments, and the *first payment* to be made on such of the usual feast days as

(*a*) Lyddon v. Lyddon, 14 Ves. Jun. 558.
(*b*) Lady Clinton v. Lord Robert Seymour, 4 Ves. Jun. 440.

should happen next *after the death of the Earl,* and the surplus of the rents and profits to be paid to the person for the time being, entitled to the *reversion or remainder* expectant on the determination of the term. The Earl of Lincoln died in 1788, leaving only one younger child, a daughter, and without executing any appointment of a yearly sum for maintenance. The Duke after the death of the Earl paid the Countess dowager of Lincoln, the yearly sum of 400*l.* for the maintenance of the child. The Duke died in 1794. Lady Catherine Clinton, the daughter, on attaining 21, in 1797, prayed an account of interest *from the death of her father the Earl.* On the other side it was contended that no interest accrued due until the death of the *Duke.* The Master of the Rolls, in giving judgment, said that taking the words of the maintenance clause by themselves, he should have no hesitation in saying that the daughter was entitled to maintenance from the death of her father during the life of her grandfather, but that it was now perfectly settled, that the Court would lay hold of any words from which it could be fairly inferred it was not the intention to charge the reversionary term in that manner, and the question then was, whether the succeeding words upon which he chiefly relied did not amount to demonstration, that it could not be the intention that on the quarter day after the death of the Earl, and each subsequent quarter day, the plaintiff might come and insist upon having her maintenance raised by sale or mortgage; and after noticing that the maintenance could not have affected the Duke's estate for life,

and must have been raised, if at all, out of the reversionary term to arise after his death, and that by express words, the power of raising money by sale or mortgage could not be used till one of the portions became payable, he declared that the clause directing that after the maintenance should be raised and paid, the surplus of the rents and profits should, until the portions became payable, be received by the persons for the time being entitled to the premises in reversion or remainder expectant on the determination of the term, appeared demonstration, that the maintenance should be raised out of the *annual profits*, and not by sale or mortgage, and which could not be during the life of the Duke, for the Duke was not a person entitled to the reversion or remainder expectant upon the determination of the term; and he accordingly decreed that the plaintiff was not entitled to interest until the death of the grandfather.

It is important to ascertain under what circumstances the words *rents and profits* will authorize a mortgage, or will be restricted to *annual* rents. By a liberal construction, it has been held, that as the words "rents and profits" in a devise would carry the fee (*a*), so the words "profits of land" when not restricted to annual profits, and especially when applied towards the raising of portions or debts, were to be considered as signifying any profits the lands would

(*a*) Allan v. Backhouse, 2 Ves. et Bea. 74.

yield, whether by sale or mortgage or otherwise (*a*). But, according to a more modern doctrine, it seems the *natural* meaning of raising a portion by rents and profits is by the *yearly* profits (*b*), and the cases which have extended it further are *exceptions* out of the general rule in which the context has afforded a different construction (*c*). Thus where a time certain is prefixed for the payment of portions, and it is evident the annual profits will not raise the money within that time, the Court has directed a mortgage (*d*). So also in a case where the trust of a term was out of the rents and profits to raise 8000*l.* for daughters' portions, to be paid them *as soon as conveniently could be*; two points were made: first, whether the 8000*l.* could be raised by sale or mortgage? and secondly, whether it should carry interest, and from what time? and it was considered, that as the daughters were of age at the time of the father's death, it would be *convenient* to raise the portions forthwith; and it was decreed, that the portions should be raised by sale or mortgage, and that the 8000*l.*

(*a*) Lingon v. Foley, 2 Ch. Ca. 205. Backhouse v. Middleton, 1 Ch. Ca. 173. Gibson v. Rogers, Amb. 93. Treat. on Eq. Vol. I. 446.

(*b*) Ivy v. Gilbert, *infra.*

(*c*) 2 P. Wms. 19. Allan v. Backhouse, *supra.*

(*d*) Backhouse v. Middleton, *supra.* *Et vide* Heycock v. Heycock, 1 Vern. 256. Berry v. Askham, 2 Vern. 26. Warburton v. Warburton, 2 Vern. 420. Okeden v. Okeden, 1 Atk. 552. Green v. Belcher, 1 Atk. 505. Shrewsbury v. Shrewsbury, 1 Ves. Jun. 234. and see 2 Ves. Jun. 481. note. and Allan v. Backhouse, *supra.*

should carry interest from the death of their father (*a*). But equity would not have raised the portions by mortgage if the children had been of tender years at the death of the father (*b*), and in such case the portions would have become due, when the rents would have raised them and would have carried no interest (*c*). And as soon as the portions could have been raised by the rents, the land would have borne its burthen and have been discharged (*d*).

If the trust be to raise portions out of rents and profits, and no time is appointed for payment, and the child dies under twenty-one, and unmarried, before it is raised, the portion will in such case be raised out of the annual rents, for the Court will not it seems direct a mortgage (*e*).

The several cases already cited shew that the words rents and profits when *added or prefixed to more general words (as sale or mortgage) by way of alternative*, will not restrict the meaning of the more general words (*f*). But if there be a *clear intention* shewn that the trust shall be confined to annual rents, the Courts will not in any case order a sale (*g*).

(*a*) Trafford v. Ashton, 1 P. Wms. 416. *Et vide* Stanhope v. Thacker, Prec. Chan. 435.

(*b*) Evelyn v. Evelyn, *infra*.

(*c*) Ivy v. Gilbert, *infra*.

(*d*) Ibid.

(*e*) Earl of Rivers v. Earl of Derby, 2 Vern. 72. *et vide* 2 P. Wms. 672.

(*f*) Greaves v. Mattison, Gerrard v. Gerrard, Sandys v. Sandys, Goodal v. Rivers, Hebblethwaite v. Cartwright, Hall v. Carter, *infra*.

(*g*) Small v. Wing, 5 B. P. C. 66. 2d Edit.

There are also cases in the books which shew that the words "rents and profits" will be restricted to annual rents, when followed or attended by other words which imply that the *money shall not be raised in any other way*, or *when the words rents and profits are placed in opposition to the more general words "sale or mortgage."* Of the latter position the before mentioned case of Corbett v. Maidwell (*a*), is an instance where the *maintenance* was directed to be issuing out of the *profits;* and the portion itself to be raised by sale or mortgage or perception of rents and profits. Of the former position, the case of Ivy v. Gilbert (*b*) is a strong instance. Roger Pomeroy settled lands to the use of himself for life, with remainder, as to part, to the use of his wife for life, with remainder to his first and other sons in tail male, with remainder to trustees for 120 years upon trust, "out of the rents and profits, as well by leases for one, two, or three lives, or any number of years determinable thereon, or for twenty-one years absolutely at the old rent, to raise 1500*l.* for daughters' portions," with remainder to Roger Pomeroy in fee. There was one only child, a daughter who married Humphrey Gilbert the defendant's father. Roger Pomeroy having no issue male, limited the reversion to trustees for ten years upon trust, if Gilbert and wife should release the 1500*l.* portion then to raise 1900*l.*, and lay out 1500*l.* (part thereof) in the purchase of land for the benefit of Gilbert and wife, and to pay the residue to Gilbert; and subject to the term of ten years, to the use of

(*a*) Corbett v. Maidwell, *supra.*

(*b*) Ivy v. Gilbert, Prec. Chan. 583. 2 P. Wms. 13.

his nephew Hugh Pomeroy for life, with remainder to his first and other sons in tail male, with remainder to John Gilbert (the defendant) for life, with remainder over. On the death of Roger Pomeroy in 1708, Hugh Pomeroy entered, but the portion of Mrs. Gilbert was unpaid. In 1712, the plaintiff's father advanced the 1500*l.* on a mortgage of the term of 120 years, in which Gilbert and wife (who had taken out administration to the surviving trustee of the term of 120 years,) and Hugh Pomeroy the tenant for life concurred. In 1758, Hugh Pomeroy died without issue male, and appointed Daniel Pomeroy his executor. On the death of Hugh Pomeroy John Gilbert entered. The plaintiff filed his bill of foreclosure. And it was argued that the words "as well by leasing, &c." were additional and not restrictive, for the testator could not have intended the portion should be raised out of the annual profits, which would have starved the remainder-man. The Lord Chancellor said, where a trust of a term for raising portions for daughters does direct a particular method for raising them, it implies a negative that they shall not be raised in any other way, and when the trust of the term, as in the present case, is to raise the portion by leasing for one, two, or three lives, or for any term of years determinable thereon, or for twenty-one years absolutely, it shall not be raised in any other way; and even by leasing, it could not be raised but by making such leases, upon which the old rent was reserved. He afterwards observed, there was no time appointed for the raising of this portion, and therefore the portion was due when the profits could raise it, and it carried no interest; but when the 1500*l.* was

or might have been raised by the profits, then it became due and the land was discharged as having borne its burthen (*a*). And he declared that the profits received by Hugh Pomeroy were as if received by Ivy, because of the clause in the mortgage deed, that it should be lawful for Hugh Pomeroy to take the profits without account until default of payment, so that he was the tenant at will to the mortgagee: And therefore the mortgage was not pursuant to the trust, and so much of the profits as had been received must go towards the payment and sinking of the portion. But there having been a power of leasing, and the intention having been to charge the land as far as might be, he directed the master to see how far the land might have been charged by leasing, and whether any lives were vacant, and he reserved the consideration how far the estate should be chargeable thereby, and ordered the representative of Hugh Pomeroy to pay the mortgage monies and interest as far as the assets would extend. This decree was afterwards affirmed in the House of Lords (*b*).

In Evelyn v. Evelyn (*c*), the like doctrine as in Ivy v. Gilbert was recognized. In that case, a man having power by deed to make any lease or leases for years sans waste, for the raising of daughters' portions, *so that such lease or leases should cease and determine upon the raising of such portions, and costs*

(*a*) *Et vide* Evelyn v. Evelyn, *infra.*

(*b*) 2 B. P. C. 468.

(*c*) Evelyn v. Evelyn, 2 P. Wms. 659.

and charges for raising the same; appointed the lands to trustees for a term of years, to raise 8000*l.* as soon as conveniently might be after his decease; but without any provision for maintenance, or mention of any express time when the portions should be payable. He died leaving a widow who had a jointure on part of the premises, and three infant daughters, the eldest of whom was not eight years of age. It was considered that the clause "So that, &c." shewed an intention that the portions should be raised out of the annual profits, and the children being of tender years, the Court refused to raise the portion by sale or mortgage, but directed the 8000*l.* to be raised out of the rents and profits without interest, the profits to be accounted for from the father's death. From this decree there was an appeal and the matter was compromised.

In Mills v. Bank (*a*), the words of the trusts were "by rents, issues and profits, or by making leases for one, two, or three lives, or for any number of years determinable on one, two, or three lives, reserving the ancient rent, or by granting copyholds on fines" to raise 10,000*l.* to be paid to daughters at 18 or marriage, and to sons at 21 or as soon after as the same could be raised out of the premises as aforesaid. It was urged that these affirmatives implied a negative, according to the general doctrine, that affirmative statutes imply a negative; in this the Lord Chancellor coincided, and said he approved the reso-

(*a*) Mills v. Bank, 3 P. Wms. 1.

lution in Butler v. Duncomb(*a*), that all trusts of terms directing the method of raising money imply a negative, viz. that the money shall be raised by the method prescribed and not otherwise. From the circumstances stated in this case it appears there were two daughters who became entitled to the 10,000*l.* one of whom married Sir George Rook, and the other married Mr. Ash, and that in the year 1706, Lord Chancellor Cowper had decreed the portion to be raised *by sale* of the trust term, and that 5000*l.* being part of the trust estate of the infant son of Sir George Rook, had been advanced by the executor of Sir George Rook to Mr. Ash, on mortgage of the term which was approved by a master, and the money was laid out in pursuance of a decree in another cause touching an account of the estate of Sir George Rook. But the case of Ivy v. Gilbert, being afterwards decided by Lord Chancellor Macclesfield as before-mentioned, this cause was re-heard before his Lordship, who, after admitting he should not have made the decree, said, it was optional in the Court on a re-hearing to do any thing thereon; and that when the money had been lent under a decree, and with the approbation of a master, for the Court to make another decree setting aside this security would be to make the Court fight against itself and act inconsistently, which rendered it more proper to apply to a superior Court, and if the defendant would have the opinion of the Court for setting aside the securi-

(*a*) *Supra.*

ties, it seemed necessary for him to file an original bill; but he gave the defendant time to advise with his counsel, what course he would pursue in so extraordinary a case. On the 11th of June, 1725, a petition was presented to have back the deposit, the parties having amicably ended the matter.

It may not be improper, in this place, to recal to our recollection the general rules on the vesting and payment of portions.

First—If a time certain is appointed for the payment of a portion, charged on land by deed or will, and the child dies before the time for payment arrives, the portion will sink for the benefit of the estate (*a*), unless a time for its vesting be expressly provided. To this rule, however, there are exceptions, when the payment of the portion is deferred from the circumstances, not of the person, but of the fund.

Secondly—If no time certain is appointed for the payment of the portion, and the child dies before it is raised, it will nevertheless vest and be payable (*b*). But, to this rule exceptions are to be found in cases in which the children have died at a very early age.

Thirdly—As soon as all the events have happened, and the portion has become payable, it may be raised by sale or mortgage, unless the raising of it be con-

(*a*) Smith v. Smith, 2 Vern. 93.

(*b*) Earl Rivers v. Earl of Derby, *supra*.

trary to the trusts of the settlement, as in some of the instances already mentioned, or unless the raising of it be restricted to annual profits, as before also mentioned.

Fourthly—Although all the events have happened, and the portions have become payable, yet if the trust be to raise the portion out of the rents and profits, and the children be of tender years, the Court will not direct a sale or mortgage, but will order the rents to be applied as they arise (*a*).

Fifthly—That the like course will, it seems, be pursued, if the legatee dies under twenty-one, and unmarried, before the portion is raised (*b*).

Sixthly—That, in case the portion is to be raised out of annual rents the portion will carry no interest; for the portion will not be due until the rents would have raised the portion; and as soon as it would have raised it, the land will have borne its burthen, and be discharged (*c*).

And lastly—That if the trust be expressly restricted to annual profits, the Court will in no case order a sale (*d*).

(*a*) Evelyn v. Evelyn, *supra*.
(*b*) Earl Rivers v. Earl of Derby, *supra*.
(*c*) Ivy v. Gilbert, *supra*.
(*d*) Small v. Wing, *supra*.

CHAPTER VII.

Of Mortgages by Executors, by Trustees for Sale and for Payment of Debts, and under Powers of charging.

Both at law and in equity the whole personal estate of the testator vests in the executor, who, from the duties of his office and the nature of his trusts, must necessarily have an absolute power over it (*a*), whether specifically bequeathed (*b*), or limited in trust (*c*), or not. The executor's first duty is to provide for payment of debts; and if the general undisposed of property or the fund expressly provided by the testator, is not sufficient for such purpose, the property specifically bequeathed or given in trust must be resorted to. Nor can a testator by any testamentary disposition of his personal estate, frustrate or delay the claims of his creditors (*d*). We accordingly find the adjudged cases and text books, when speaking of the powers vested in the executors, using strong expressions: and we also find the judges shewing great reluctance to fetter the executors in

(*a*) Vide Nugent v. Gifford, 1 Atk. 463. M'Leod v. Drummond, 17 Ves. Jun. 161.

(*b*) Ewer v. Corbet, 2 P. Wms. 149. Burting v. Stonard, Ibid. 150. Langley v. Earl of Oxford, Amb. 17. Andrew v. Wrigley, 4 B. C. C. 125.

(*c*) Vide M'Leod v. Drummond, *supra*.

(*d*) Andrew v. Wrigley, *supra*.

the exercise of their functions. Notwithstanding this great discretionary authority, numerous cases are to be found in the books, arising from the circumstances attending the disposition by executors of their testator's assets; and on some of the points a considerable difference of opinion has existed.

The power of the executors to dispose of a specific legacy seems to have been formerly questioned, and even in a modern valuable treatise (*a*) the point is put rather doubtfully. An early case (*b*) was considered as militating against this power; but it has been since observed (*c*), that was not in fact the case of a specific bequest, it being a charge on a particular part of the assets, and there was supposed to be strong circumstances of fraud in the conduct of the parties. Succeeding cases (*d*) have established this power of disposition by the executors beyond question (*e*).

(*a*) Sugden on Vendors and Purchasers 435, 4th edition.

(*b*) Humble v. Bill, 2 Vern. 444.

(*c*) 17 Ves. jun. 160 3 Atk. 241.

(*d*) Ewer v. Corbet. Burting v. Stonard. Langley v. Earl of Oxford, *supra*.

(*e*) Mr. Sugden, in his treatise on vendors and purchasers, has raised a doubt whether it is safe to take an assignment of a specific legacy from the executor without the concurrence of the specific legatee, lest the executor should have assented to the bequest, and he cites Thomlinson v. Smith. Finch 378. It is submitted this was a case of gross fraud, and is but a slender authority. In that case, a man bequeathed a leasehold estate to his wife for life, remainder to A. for ten years, remainder to his children. The widow took out administration with the will annexed, and assented to the bequest, and enjoyed the property dur-

As the executor may absolutely dispose of the testator's assets for the general purposes of the will, there seems no good reason why in the exercise of a sound discretion, and presuming the language of the will does not peremptorily require an absolute sale, the executor may not raise the money required by a partial sale or mortgage of the assets. Accordingly the proposition is broadly laid down by Lord Hardwicke in Mead v. Orrery (*a*), and yet more broadly and expressly by Lord Thurlow in Scott v. Tyler (*b*),

ing her life. After her death, the defendant in the suit, (who had become the owner of the inheritance) purchased of A. his interest in the leasehold. After the expiration of the ten years, the children exhibited a bill for an account, and prayed the remainder of the term might be decreed to them. The defendant set up an assignment by the widow as administratrix, in consideration of 150*l.* the better to enable her to pay the debts of the testator, and insisted, that, as the plaintiffs charged that the administratrix assented to the bequest, they had their remedy at law notwithstanding the assignment, and ought not to have relief in equity. But the Court being satisfied that the testator left assets to pay his debts, and that the administratrix did assent to the said legacies, decreed to the plaintiffs the residue of the term. It is submitted that in this case the enjoyment of the leasehold by the administratrix, for life, and the subsequent purchase of A.'s interest, were in direct contradiction to the alleged assignment by the administratrix; and it is conceived that if a purchaser or mortgagee shall *bonâ fide* deal with an executor, within a reasonable time after the testator's death, and obtain possession of the muniments of title, a specific legatee would never be permitted at law or in equity, to set up the executor's assent against the sale or mortgage, for, by sale and delivery, the title of the purchaser or mortgagee is complete. Vide Scott v. Tyler, Dickens 725, and 17 Ves. jun. 166.

(*a*) Mead v. Lord Orrery, 3 Atk. 239.

(*b*) Scott v. Tyler, Dickens 724.

and has been since recognised by Lord Eldon in M'Leod v. Drummond (*a*). Lord Loughborough, indeed, is reported to have said, a mortgage is not a natural way of raising money, and that it may lead to an inquiry as to the circumstances of the testator's estate (*b*); but this observation, it is conceived, must be considered as applying to transactions attended with circumstances exciting suspicion of fraud.

The mortgage may be either of legal or equitable assets (*c*), or of mere *choses in action* (*d*), and may be by actual assignment, or by deposit (*e*); and a dealing with one of many executors will be valid, for each is competent (*f*). The deed of mortgage need not state that the money is wanted for the purposes of the will, for in order to vitiate the security, it must be shewn the money was *not* for the payment of debts (*g*). Nor is the mortgagee bound to see to its application (*h*), although Lord Kenyon has expressed an opinion that a trust might be so framed as to call on a purchaser from an executor to see to the application of the money (*i*); but this observation

(*a*) M'Leod v. Drummond, 17 Ves. jun. 154.

(*b*) Andrew v. Wrigley, 4 B. C. C. 138.

(*c*) Nugent v. Gifford, 1 Atk. 463; et vide 17 Ves. jun. 167.

(*d*) Scott v. Tyler, *supra*.

(*e*) Ibid.

(*f*) Ibid.

(*g*) Bonney v. Ridgard, 4 B. C. C. 138. cited.

(*h*) Scott v. Tyler, *supra*; et vide Elliott v. Merryman, Barnard. 78.

(*i*) Bonney v. Ridgard, 4 B. C. C. 130, cited.

must also, it is conceived, be supposed to apply to a sale made under very peculiar circumstances, and not for the purpose of the payment of debts generally.

Fraud or covin, however, will vitiate any transaction, and turn it to a mere colour. If one concerts with an executor, by obtaining the testator's effects at a nominal price, or at a fraudulent under value, or by applying the real value to the purchase of other subjects for his own behoof, or in extinguishing the private debt of the executor, or *in any other manner* contrary to the duty of the office of executor, such concert will involve the seeming purchaser or pawnee, and make him liable to the full value (*a*).

It was indeed held by Lord Mansfield(*b*), that such was the power of an executor, that although it was apparent on the face of the transaction that he was about to apply the assets to a purpose foreign to the will, yet a person with that knowledge was justified in dealing with him upon the supposition that all the debts were paid, or that the testator's estate was or might be indebted to the executor to that amount: and in a very recent case (*c*), under peculiar circumstances, the latter supposition has been allowed to be urged on behalf of depositaries of bonds, to whom they had been pledged by executors for securing advances to themselves in another capacity. Lord Mansfield accordingly held, that where

(*a*) Scott v. Tyler, *supra*.
(*b*) Whale v. Booth, 4 Term Rep. 625; note.
(*c*) M'Leod v. Drummond, *supra*.

a creditor under a writ of *fi. fa.* took in execution *bona propria* and *bona testatoris* vested in his debtor, *knowing them to be such*, the execution was valid on the ground that the executors joined in the bill of sale, which his Lordship considered tantamount to a conveyance (*a*). This doctrine, to the full extent laid down by Lord Mansfield, Lord Chancellor Eldon expressed himself not prepared to follow (*b*). And in a case subsequent to Whale v. Booth, Lord Kenyon and Ashhurst and Grose Justices, against Buller Justice, decided that *bona testatoris* could not be taken in execution under a *fi. fa.* in satisfaction of the executor's private debt (*c*).

In two leading cases also in Equity (*d*), Lord Hardwicke supported assignments of the testator's assets, made by the executor in satisfaction of his own debt or for his private purposes. But it is to be observed, that in both these cases a considerable time had elapsed since the death of the testator, and in the first instance the executor was also sole residuary legatee, (the bill being filed by the testator's daughters as *creditors* under a marriage settlement); and in the second instance, three executors concurred in the assignment of a mortgage as a collateral security for one of them in an appointment of receiver, who was also one of five residuary legatees, and to whom the deed stated the mortgage to belong. In this latter

(*a*) Whale v. Booth, *supra*.

(*b*) M'Leod v. Drummond, *supra*.

(*c*) Farr v. Newman, 4 Term Rep. 621; et vide what is said of this case by Lord Eldon, in M'Leod v. Drummond, *supra*.

(*d*) Nugent v. Gifford, *supra*. Mead v. Lord Orrery, *supra*.

instance, the bill was filed by the other residuary legatees, being the first instance it seems in which *residuary* legatees had attempted to follow the assets into the hands of a purchaser, the former instances having been confined to creditors and specific legatees. These two cases depended on particular circumstances (*a*); the broad principles contained in Mead v. Lord Orrery were afterwards disapproved by Lord Kenyon in Bonney v. Ridgard (*b*); and in a prior case (*c*) relief had been actually granted to a creditor against a purchaser of part of the testator's assets from an executor, the purchaser having allowed the executor's private debt out of the purchase-money, and having express notice that the creditor's debt was unpaid, than which, Lord Alvanley remarks, there cannot be a stronger instance of a devastavit (*d*). In a recent case (*e*) relief was granted to a *pecuniary* legatee against bankers, with whom part of the assets had been deposited, to secure a private debt of the executor, within a month after the death of his testatrix, attended with circumstances of gross negligence in the bankers, but unaccompanied by fraud; which decision is in accordance with the known opinion of Lord Chancellor Thurlow on the second point in the case of Scott v. Tyler (*f*); in which latter case, however, the circumstances were stronger than in Hill v. Simpson, for in Scott v. Tyler the bonds were spe-

(*a*) Vide Taner v. Ivie, 2 Ves. 470.

(*b*) Bonney v. Ridgard, 2 B. C. C. 433. 4 B. C. C. 130. 7 Ves. jun. 167, cited.

(*c*) Crane v. Drake, 2 Vern. 616.

(*d*) Andrew v. Wrigley, 4 B. C. C. 137.

(*e*) Hill v. Simpson, 7 Ves. jun. 152.

(*f*) *Supra.*

cifically bequeathed, and were handed over to the bankers to secure a debt *already due* to the executor, and not for advances *then made*, which, according to the opinion of the Master of the Rolls in M'Leod v. Drummond (*a*), is a material circumstance; and the bankers had also previous knowledge of the property.

In a very recent case (*b*) relief was refused on a bill filed by two co-executors in Scotland, who had never acted, but had permitted the other two executors in England to manage the property for a great length of time. The acting executors, many years after the testator's death, pledged some bonds belonging to him with their bankers, to secure advances made to them as army agents, representing that an account was kept between them and the estate, to which they were, or frequently might be, in advance. The Master of the Rolls dismissed the bill, and on appeal to the Lord Chancellor, the decree was affirmed under the peculiar circumstances of the case.

Relief will also be refused if there has been great delay on the part of the legatees in making claim, even although they have but a contingent or expectant right, for such an interest will entitle them to know what debts the testator owed, and what part of his estate has been applied to the payment of them (*c*).

(*a*) 14 Ves. jun. 353.

(*b*) M'Leod v. Drummond, 14 Ves. jun. 353. et vide 17 Ves. jun. 170.

(*c*) Andrew v. Wrigley, 4 B. C. C. 136.

The result of the cases seems to be, that if a purchaser or mortgagee advances money to an executor, (even though the executor be also residuary legatee), for purposes which he knows to be foreign to the will, or if he takes as a security for the executor's private debt part of the testator's assets, he does it at his own risk and is liable to a suit for relief on bill filed either by a creditor, or by a pecuniary, specific, or residuary legatee, if such legatee pursue his remedy within a reasonable time. If the executor is also specific legatee, a mortgagee from him of the specific legacy for satisfaction of his private debt will be safe, unless it can be shewn he knew there were debts unpaid (*a*).

It is material also to observe, that if a particular fund is pointed out by the will for the payment of debts, it may become necessary for a mortgagee to inquire if that fund has been exhausted.

Estates are sometimes vested in trustees upon trust for *sale* without any express power to mortgage. A mortgage is a partial sale, and therefore a trust for sale will, generally speaking, include a mortgage (*b*)*; and it must depend upon the nature of the trust, if it is not authorized by it. If the object of the

(*a*) Taylor v. Hawkins, 8 Ves. jun. 209.

(*b*) 3 P. Will. 9.

* In corroboration of this doctrine, it has been suggested, that if a trustee for sale becomes also the purchaser, relief in equity is given to the *cestuis-que* trust on their paying to the trustee the money advanced with interest, thereby treating the transaction as a mortgage under the power for sale.

trust is for a definite purpose, such as to raise a certain sum of money for debts, portions, or the like, without an ulterior intention of effecting an entire conversion into personalty by an absolute sale, there seems no objection to the money being in every case, where practicable, raised by mortgage. Questions of this sort must depend on the peculiar circumstances of the trust, and the intention of the parties as shewn on the instrument.

If there be a trust to raise money by sale or mortgage, and the trustees raise the money by mortgage, it is doubtful whether they can afterwards exercise their trusts for sale for the purpose of discharging the mortgage; for the money being once raised, the trustees are *functi officio*, the purposes of their trust being completed. It is clear the mortgagee cannot *compel* them to sell, even if they have the power (*a*).

If a man has a power of charging an estate with a sum of money, he may also charge it with interest (*b*); nor will equity interfere to diminish or reduce the rate of interest charged (*c*). An unlimited power to charge will in Equity authorize a disposition of the estate itself in trust for sale (*d*); but a particular power of charging will not authorize a limitation of

(*a*) Palk v. Lord Clinton, 12 Ves. jun. 48.

(*b*) Kilmurry v. Geery, 2 Salk. 538. Boycot v. Cotton, 1 Atk. 556. Evelyn v. Evelyn, 2 P. Wms. 591. Hall v. Carter, 3 Atk. 359. Lewis v. Freke, 2 Ves jun. 507.

(*c*) Lewis v. Freke, *supra*.

(*d*) Long v. Long, 5 Ves. jun. 445.

the fee to secure the money, and the appointment will be void (*a*). Equity would, however, most probably, in the latter case, relieve, as in the case of a defective execution (*b*).

The converse of the doctrine laid down in Long v. Long, is good; for a power to appoint the fee will authorize a charge, which equity will carry into effect by a sale (*c*). And it will also authorize an appointment to trustees in trust for sale (*d*).

In a recent case, a power to charge with a sum of money was held to authorize the grant of a rent charge until the principal and interest were paid (*e*).

If there be a devise in trust, by mortgage or sale, to raise money for payment of debts, the trustees may proceed to raise the money without the sanction of a decree of a court of equity; for decrees of equity do not give rights, but are only an execution of the trust or power already subsisting (*f*). A devise for payment of debts takes the case out of the statute against fraudulent devises (*g*); so that the bond

(*a*) Jenkins v. Keymis, 1 Lev. 150, 237. Hard. 395. 1 Chan. Ca. 103.

(*b*) See Sugden on Powers, 2 Ed. 437.

(*c*) Roberts v. Dixall, 2 Eq. Ca. Ab. 668, et vide Palmer v. Wheeler, 2 Ball and Beatty, 18.

(*d*) Kenworthy v. Bate, 6 Ves. jun. 793. and see 1 Ves. and Bea. 78.

(*e*) Blake v. Marnell, 2 Ball and Beatty, 35.

(*f*) Earl of Bath v. Earl of Bradford. 2 Ves. 587.

(*g*) 3 Will. and Mary, c. 14.

and simple contract creditors can only come in *under the will* (*a*), and they are therefore put on an equal footing in equity, and are to be paid *pari passu* (*b*); for the specialty creditors cannot pursue the estate as legal assets, which, if it were within the statute, they might do (*c*). On the same principle, it has been held, that the creditors must comply with the terms of the will; and, therefore, if the debts are directed to be paid out of the annual rents, there can be no sale or mortgage (*d*). In Cook v. Parsons (*e*), Lord Nottingham thought the words, "To set and farm let, and out of the rents (without saying profits) pay his debts," were not sufficient whereon to ground a sale; and Lord Hardwicke refused a sale where the words were, "by perception of rents and profits, or by leasing or mortgaging the same, to raise and pay the sums and legacies mentioned in the will" (*f*); he added, if it had been a trust of the rents and profits, it might have been sold. But his lordship did not recollect any case which would authorize a sale where there were other limiting words following rents and profits. In Baines v. Dixon (*g*), estates were devised to trustees and their heirs upon trust for payment of the testator's funeral expenses, debts, and legacies, as

(*a*) Howse v. Chapman, 4 Ves. jun. 550.

(*b*) Conyngham v. Conyngham, 1 Ves. 523.

(*c*) Fonb. Treat. on Equ. Vol. I. 448. note (*o*).

(*d*) Lingard v. Earl of Derby, 1 B. C. C. 311.

(*e*) Cook v. Parsons, Pre. Chan. 184. et vide Sir John Talbot v. Duke of Shrewsbury, Gilb. Rep. Eq. 89.

(*f*) Ridout v. Earl of Plymouth, 2 Atk. 105.

(*g*) Baines v. Dixon, 1 Ves. 41.

far as his personal estate should be deficient, and for raising maintenance, &c. for his children; and to convey to his eldest son, at 23; and he directed the legacies to be paid after his debts were satisfied, as the rents should *advance* the same. Lord Hardwicke, on appeal, directed the debts to be raised by sale, and the legacies to be paid out of the annual profits.

An opinion was however entertained by Lord Thurlow, that to take a devise of real estate for payment of debts, out of the statute against fraudulent devises, it was necessary it should *effectually* provide for this purpose (*a*); in which opinion Lord Eldon appears to coincide (*b*).

A general charge of debts by deed or will on real estate, will not give interest on simple contract debts not carrying interest (*c*); nor will the single circumstance of the debt being liquidated in the Master's Office give interest; nor will any delay entitle the simple contract creditor to interest, if the delay arise out of or is the natural consequence of the jurisdiction of the Court, or might have been prevented by the party (*d*). On a cause coming on for further directions, the

(*a*) Hughes v. Doulben, 2 B. C. C. 614. et vide Fonb. Treat. on Eq. Vol. I. 448. note (*o*).

(*b*) Bailey v. Ekins, 7 Ves. jun. 323.

(*c*) Barwell v. Parker, 2 Ves. 364. Earl of Bath v. Earl of Bradford, Ibid. 588. Shirley v. Ferrers, 1 B. C. C. 41. Creuze v. Hunter, 2 Ves. jun. 157. Vide contra Carr v. Lady Burlington, 1 P. Will. 229. Maxwell v. Wettenhall, 2 P. Will. 26. But the devise will carry interest, if the charge be of the simple contract debts of a third person, Shirt v. Westby, 16 Ves. jun. 393.

(*d*) Creuze v. Hunter, *supra*, and see Note at the end of the case.

Court may give interest (*a*). After liquidation, any one creditor may prosecute the decree (*b*.) " And the trust or charge, whether for simple contract or specialty debts (for as to the trust both are on a footing, though there be no term created for that purpose), gives to a Court of Equity incidentally, authority to make a mortgage or sale, because the estate, by virtue of such devise, becomes a trust, and such Court having jurisdiction to liquidate it, after liquidation, can give interest on the debt.

" Then the debt, being a gross sum with the interest, becomes an incumbrance, and a mortgage may be made to pay it off; and in such case, the creditors, if not paid, can have no relief but by application to a Court of Equity, because they can have no action against the heir (for want of assets descended), or against him and the devisee (because the case is out of the statute), and then when all or any of the creditors join in, or bring a bill for satisfaction of their debts, and to have a performance of the trust by sale or mortgage, from the moment the mortgage is made, that also, it is clear, carries interest.

" And as the Court of Chancery will, upon bills brought by creditors, decree money to be raised by mortgage or sale, so they will support trustees who mortgage without such decree first had, *if it be fairly done*, for the trustees need not wait for a decree of the Court, which, if it were necessary, would oblige every person to come there, but they may do it

(*a*) Creuse v. Hunter, *supra*, and see note at the end of case.
(*b*) Ibid.

without, and this is plain, if we consider the nature of a decree of that Court, for such decree does not (as already stated) (*a*) create or give a right, but only enforces an execution of a trust and power before subsisting.

" And in allowing interest in such cases, Equity acts by analogy to the proceedings, where creditors are left to their legal remedy, for if a bond creditor bring an action against the heir at law, or against him and the devisee jointly, and (since the statute of fraudulent devises,) if the heir, in case of descent, or heir and devisee joining in case of a devise, come in and confess real assets, (which in justice they ought to do,) in that case judgment goes against them for the debt to be levied out of the estate; but because it cannot be known how much the value of the land descended or devised is, *per annum*, there issues a writ of inquiry to the sheriff, and the judgment proceeds, that the sheriff shall deliver the lands to the plaintiff, *donec debitum predictum levaverit;* then the sheriff makes an inquiry in nature of an extent, fixes the extended value, which is always much below the real value of the lands, and delivers them to the plaintiff according to that value. The remedy that the heir and devisee have, is by *scire facias* to have an account and the lands delivered back. But a Court of law will do that only according to the extended value by the sheriff, therefore the heir and devisee must come to a Court of Equity to have it extended according to the real value, and

(*a*) *Supra*, Page 187.

to have it back afterwards. But the Court will insert terms, namely, upon paying interest, for a Court of Equity will not extend its powers to assist the heir at law or devisee, but according to equity, by making him answer satisfaction, and do justice (*a*)."

Lord Eldon has remarked, that a mere charge is a declaration of intention, on which a Court of Equity will fasten, and by virtue of which they will draw out of the mass going to the heir, or to others, that quantum of interest which will be sufficient for the debts (*b*).

It is decided that executors or trustees shall not, after a decree to account, lend money on mortgage, without an application to the Court (*c*); and it has been said, *arguendo*, that a trust to lay out money "on good security," will not authorize a loan on mortgage (*d*). If the mortgage is contrary to the trust, or in disobedience of an order to the contrary, the executors or trustees will be responsible for the loss; but otherwise the mortgage will be a fund in their hands, which they will be ordered to pay into Court (*e*).

If a mortgagor pay off a mortgage, having notice

(*a*) Vide Earl of Bath v. Earl of Bradford, 2 Ves. 589, and Powell on Mortgages, Vol. I. 88. 4th edition.

(*b*) Bailey v. Ekins, 7 Ves. jun. 323.

(*c*) Widdowson v. Duck, 2 Mer. 494.

(*d*) Ibid. *Sed quære.*

(*e*) Ibid.

it is trust money, he is bound in equity to see to its application, unless he is expressly or impliedly exempted from that obligation; and even if he is so exempted, still a difficulty occurs, from the necessity of producing the settlement or will, creating the trust, to prove the fact, and of engrafting the proof on the title, to satisfy an assignee of the mortgage, as well as future purchasers. To obviate this latter inconvenience, the better practice is for the mortgagor to execute a mortgage to the executors or trustees, without putting notice of the trust on the mortgage, and then for the executors or trustees to execute a separate declaration of their trust. To meet the former, it is advisable not to give the *mortgagor* notice of the fact of the money being in trust.

There is a further rule in equity, *viz.* that if two or more persons advance their own monies on mortgage, whether in equal proportions or not, and the mortgage is limited to them so as to create a joint-tenancy at law, nevertheless in equity they shall be considered as tenants in common, and there shall be no survivorship between them. The consequence is, that if a mortgage is made to two or more persons, without notice of the trust on the face of the deed, so that they appear to have made advances of their proper monies; and if one of them die before the mortgage money is paid off, the concurrence of the executor or administrator of the deceased mortgagee becomes necessary in the discharge. This inconvenience has given rise to a proviso now frequently inserted in such instruments, *viz.* that if one of the mortgagees shall die before the money is paid off, the

receipt of the surviving mortgagee or his executors, administrators or assigns, shall be a good and sufficient discharge to the mortgagor, his heirs, executors, administrators and assigns, although and notwithstanding the executor or administrator of the deceased mortgagee shall not concur therein, any rule of equity to the contrary thereof in any wise notwithstanding.

CHAPTER VIII.

Of Equitable Mortgage by Deposit of Title Deeds.

The statute of the 29 Car. 2. cap. 3. commonly called the statute of frauds and perjuries, enacts (*a*), that "no action shall be brought upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." Notwithstanding this statute it is now decided, that if the title deeds of an estate are (without even verbal communication) deposited by a debtor in the hands of his creditor, or of some third person on his behalf, such deposit is *of itself evidence of an agreement executed for a mortgage of the estate* (*b*), of which agreement the creditor may avail himself as of an *agreement in writing* for that purpose, for he may file his bill for the completion of the security by a legal conveyance from his debtor, who will not be allowed to plead the statute of frauds; or if the debtor become bankrupt, the creditor may present the usual petition for payment of his debt by sale of the estate, and to be allowed to prove the deficiency, if any, under the commission.

(*a*) 29 Car. 2. c. 3. sec. 4.

(*b*) *Ex parte* Wright, 19 Ves. jun. 258.

Previously to the establishment of the doctrine of equitable mortgage by deposit of title deeds, it was held that the mere possession of the title deeds of an estate gave the holder no interest in the estate itself, except collaterally, as in the instance put by Lord Eldon (*a*), that is, if the owner of the lands could not part with the estate without the deeds, he should not have them without paying the debt due from him to the holder, so that the possession of the deeds gave no direct interest in the estate, but gave to the creditor an interest arising out of the power of embarrassing the property in the sale (*b*). And it was considered that to give the creditor a charge on the land without an agreement in writing would be in direct contravention to the statute of frauds. Lord Eldon, indeed, is reported to have used expressions denoting his opinion, that the judicial decisions establishing this doctrine approach to a virtual repeal of the statute, for he is reported to have said, when pressed to a further extension of the doctrine, that the statute must not be *repealed* by him farther than it had been hitherto *repealed* by his predecessors, to whose authority he submitted (*c*); language which must be construed as denoting his Lordship's strong disapprobation of that which he has admitted must be now considered as settled law (*d*). How far its existence in deterioration of the public revenue, by

(*a*) *Ex parte* Whitbread, 19 Ves. jun. 211. *Et vide ex parte* Kensington, 2 Ves. et Bea. 83.

(*b*) Vide Head v. Egerton, 3 P. Wms. 279.

(*c*) *Ex parte* Whitbread, *supra*.

(*d*) *Ex parte* Kensington, *supra*.

diminishing the amount of stamp duties, is of sufficient importance to attract the notice of the legislature remains to be seen. Lord Eldon has repeatedly expressed his surprise that the doctrine was ever admitted, and a determination has been shewn not to extend it beyond its present limits (*a*).

The first decision in favour of this doctrine was made by Lord Chancellor Thurlow in the case of Russell v. Russell, first heard before Lords Commissioners Loughborough and Ashhurst in Easter Term 1783 (*b*). In that case, a bill was filed by a depositary of a lease for securing a debt owing by one who had since become bankrupt, and praying a sale. It was objected by the defendants that the plaintiff's claim was against the statute of frauds and perjuries. The Lords Commissioners considered that this was a contract executed, and that it was open to explanation upon what terms the lease was delivered; an issue was accordingly directed at law to try, whether the lease was deposited as a security for the sum advanced? which, upon trial, the jury found. On a further hearing, (on the equity reserved) Lord Chancellor Thurlow ordered the lease to be sold, and the plaintiff to be paid his money. This case was followed by those of Featherstone v. Fenwick and Harford v. Carpenter, both heard before Lord Thurlow, in which the same principle was acted upon (*c*).

(*a*) *Ex parte* Hooper, 1 Mer. 7.

(*b*) Russell v. Russell, 1 Bro. C. C. 269.

(*c*) Featherstone v. Fenwick, Harford v. Carpenter, 1 Bro. C. C. 269, note.

These decisions are the foundation of the doctrine of equitable Mortgage by Deposit of Title Deeds, a species of security, which however much it has excited the disapprobation of succeeding judges (*a*), has now become of daily practice.

It will be necessary for us to consider the leading points which have been established by the decided cases.

First. It is required that the deposit shall be made with the view and intent of an immediate security, and not *diverso intuitu*.

For this proposition, a case heard before the late Master of the Rolls in Dec. 1806, is an express authority (*b*). The facts were: Messrs. Wilkinsons (father and son) were indebted to Norris in a considerable sum, partly on his own account and partly as factor for a foreign house. Wilkinson the father, being possessed of landed estate, his son by his direction, delivered the title-deeds into the hands of Thompson (the solicitor of Norris). After this, Wilkinson the father died, having by his will devised his real estate to trustees upon trust to sell and pay debts. Norris afterwards filed his bill, alleging the delivery of the title deeds to Thompson to have been by way of deposit for security of the debt.

(*a*) *Ex parte* Haigh, 11 Ves. jun. 403. Norris v. Wilkinson, 12 Ves. jun. 192. *Ex parte* Whitbread, *supra*. *Ex parte* Hooper, *supra*.

(*b*) Norris v. Wilkinson, 12 Ves. jun. 192.

A considerable difference of testimony existed between Thompson and Wilkinson, jun. relative to the transaction; but the facts admitted by Thompson were, that the deeds were delivered to him for the purpose of enabling him to *prepare* a mortgage security, and which was accordingly prepared; but that the execution of it was prevented by the illness and subsequent death of Wilkinson, sen. Wilkinson, jun. distinctly swore in his answer, that the deeds were delivered as *instructions* for preparing a security, and not as a security in the first instance, and Thompson could not recollect Wilkinson, jun. saying in terms, that he and his father did agree to the deposit of the deeds *as a security*. By the bill the plaintiff insisted he had a specific lien on the land: the defendant contended, he must come in as a creditor under the decree for payment of debts. The Master of the Rolls, after expressing his want of approbation of the doctrine established by the cases of Russell and Russell, Featherstone and Fenwick, and Harford and Carpenter, said, "I am of opinion this is not a case of deposit of deeds. It is clear, these deeds were not delivered by way of deposit in the sense in which that word has been used in the cases, *i. e.* as a present and immediate security, but were delivered only for the purpose of enabling the attorney to draw the mortgage, which it is alleged Wilkinson, sen. had agreed to give. Passing by all the objections made to Thompson's testimony, and all consideration of the particulars in which it is contradicted by the deposition of Wilkinson, jun. and taking it exactly as it stands, it does in every part of it prove what I have stated in respect to the pur-

pose for which the deeds were put into his hands. Now in all the cases that have been referred to, the deeds were delivered *by way of deposit.* Such deposit was indeed held to imply an obligation to execute a legal conveyance whenever it should be required; but the primary intention was to execute *an immediate pledge*, with an implied engagement to do all that might be necessary to render the pledge effectual for its purpose. But here there was no intention to put the deeds into pledge; that was not the thing which the parties had in contemplation." And in support of his decision he cited a case heard before Lord Hardwicke (*a*), in which a man having delivered his title deeds to an attorney for the purpose of a mortgage being prepared, died before it was completed, and the creditor attempted to establish a claim on the land as equitable mortgagee, but the point was given up. And in a recent case (*b*), the Lord Chancellor decided that where leaseholds had been assigned by way of mortgage for securing 400*l.* the mortgagee could not tack a simple contract debt on a parol agreement, because the contract, under which he held, was a contract for conveyance only, and not for deposit.

Secondly. The deposit will create an equitable mortgage for the debt then due, although there be not one word spoken at the time (*c*).

(*a*) Brizick v. Manners, 9 Mod. 284.

(*b*) *Ex parte* Hooper, 1 Mer. 7.

(*c*) *Ex parte* Mountfort, 14 Ves. jun. 606. *Ex parte* Langston, 17 Ves. jun. 230. *Ex parte* Kensington, 2 Ves. et Bea. 83.

Thirdly. The deposit may be a security as well for debts actually due, as also for future advances, if made out by evidence or oath uncontradicted. Of this, a doubt seems to have been entertained by the Master of the Rolls in Norris v. Wilkinson: but in a subsequent case heard before Lord Chancellor Eldon (*a*), where Knight deposited title deeds with Langston and Co. as a security for their advances on the account of Joshua and Edward Knight; and Langston and Co. advanced several sums between the 14th of June, when the deeds were deposited, and the 20th of June, on which day a memorandum was signed by Knight, stating that the deeds were deposited as a security for the several advances; on the same day an act of bankruptcy was committed by Knight, on which a commission issued on the 23d. The Lord Chancellor decided that the memorandum containing nothing inconsistent with the claim of Langston and Co. could not prejudice them, but was a ratification of the prior agreement, and that the petitioners were intitled to hold the deeds as a security for their debt (*b*).

Fourthly. The deposit may be made either to the creditor himself or to some third person over whom the depositor has no control. But it will not be effec-

(*a*) *Ex parte* Langston, *supra*, and see *ex parte* Mountfort, *supra*.

(*b*) *Vide ex parte* Hooper, *supra*, where Lord C. Eldon says, he is dissatisfied with the principle on which he acted in the above case, of extending the original doctrine so as to make the deposit a security for future advances, and that at all events the doctrine is not to be further enlarged.

tual if made to the wife of the depositor, nor *a fortiori* if permitted to be retained by the debtor, even if he should deliver a memorandum to that effect into the hands of the creditor (*a*). Nor will the equitable deposit in the hands of one person be extended to an advance made by another person, unless the party holding the deeds is a mere trustee and has made no advance (*b*).

Fifthly. Although there be an unstamped agreement between the parties, which is inadmissible as evidence, yet other parol evidence may be adduced to establish the equitable mortgage (*c*).

Sixthly. An equitable mortgage by deposit of title deeds shall have preference over a subsequent purchaser or mortgagee of the legal estate *with notice*. And notice will be implied from the nature of the transaction, as if the subsequent purchaser or mortgagee was informed the creditor was in possession of the title deeds, and neglected to make inquiry for what purpose he held them, which is *crassa negligentia* (*d*).

Seventhly. If a *bonâ fide* deposit be made, and the debtor afterwards and in immediate contemplation of bankruptcy, execute a conveyance of the legal estate to the creditor in completion of the mortgage,

(*a*) *Ex parte* Coming, 9 Ves. jun. 115.
(*b*) *Ex parte* Whitbread, 19 Ves. jun. 212.
(*c*) Hiern v. Mill, 13 Ves. jun. 114.
(*d*) Ibid.

it is a good legal title and will be protected by the equitable title previously obtained (*a*).

Eighthly. When the deposit is made for a particular purpose, that purpose may be enlarged by a subsequent agreement without an actual redelivery; as when deeds are deposited to secure advances by a banking firm, the deposit may be extended to secure advances made by the bank after a change of partners (*b*).

Ninthly. Whether to constitute the equitable mortgage by deposit, there shall be a delivery of *all the title deeds*, does not yet seem to be actually decided*. In *ex parte* Wetherell (*c*), the question was, what was the effect of the delivery of the title deeds to one moiety only of the estate, the title deeds of the other moiety being retained by the debtor, and passing into the possession of his assignees, but the mortgagees having understood that the deeds delivered to them related to the entirety. The Lord Chancellor thought that under the circumstances of that case, there was sufficient *evidence in writing* (and on which he grounded his decision) that there should be a mort-

(*a*) *Per* Lord Eldon in Hiern v. Mill, *supra*.

(*b*) *Ex parte* Kensington, 2 Ves. et Bea. 79.

* 18 January, 1820. A. deposits his title deeds, save the conveyance to himself, with B., and afterwards deposits the deed of conveyance with C. and becomes bankrupt. B. C. and the assignees contend for priority. *Coram* Lord Eldon. The author hopes to be able to state this case in the Appendix, as also a case which he understands has been heard before the vice-chancellor; not yet reported.

(*c*) 11 Ves. jun. 398.

gage of the entirety, and consequently he did not determine, to use his own words, "Whether that would not be taken to be a sufficient deposit, which could be taken upon looking at the instruments to amount to evidence, that the estate was meant to be a security."

Tenthly. An equitable lien on copyholds will be created by a deposit of a copy of court roll (*a*).

Eleventhly. It should seem that if there be a written instrument stating the terms on which a deposit is made, an inference contrary to it, founded on affidavit alone, will not be admitted. Such at least appears to be the principle on which the case of *Ex parte* Combe was decided (*b*). The case is not very accurately reported, but it should seem the facts were as follow: Meux and Co. were creditors of Morgan, who for their security had executed a warrant of attorney to confess judgment, and had deposited the lease of his house with them. In January 1810, Meux and Co. entered up judgment and levied execution for 1560*l.* 6*s.* 5*d.* Morgan applied to Combe and Co. to lend him money to satisfy Meux and Co. and to supply him with beer, which they agreed to do; and Morgan on the 20th of Jan. 1810 executed to them a warrant of attorney, with a defeasance stating that Combe and Co. had that day lent him 1250*l.* and *that he had deposited* with them the lease of the house as a collateral security for the 1250*l.*

(*a*) *Ex parte* Warner, 19 Ves. 202.

(*b*) *Ex parte* Combe, 17 Ves. 369. Et vide *ex parte* Kensington, *supra*.

and further advances not exceeding 1500*l.* On the same day Combe and Co. paid off Meux's debt, and satisfied the law charges and sheriffs' poundage, amounting in the whole to 1252*l.* and thereupon Meux and Co. delivered to them the lease. On the 14th of August following, Combe and Co. entered up judgment against Morgan, and levied execution for 1420*l.* 14*s.* But a commission of bankrupt issuing against him on that day, they withdrew their execution and proved part of their debt for beer delivered as a debt under the commission, and presented a petition praying a sale of the leasehold premises for payment of the residue of their debt; and they contended that having paid off Meux and Co. they were intitled to stand in their place. An important fact is omitted in the report, viz. the time when the act of bankruptcy took place; but it must be presumed to have occurred previously to the 20th of Jan. 1810, for otherwise there seems no good reason why Combe and Co. might not have rested on the strength of the deposit made to themselves. The Lord Chancellor, however, dismissed the petition on the ground that the petitioners were bound by the recital in the defeasance, viz. *that Morgan had deposited the deeds.*

Twelfthly. If the creditor by his bill, or in case of his debtor's bankruptcy, by his petition and affidavit, insist that the deposit was made as a security for future advances, as well as for the debt then due, and the debtor by his answer to the bill, or by affidavit in bankruptcy, deny the fact, the Court will direct an inquiry to be made by the master or the Commissioners, in respect of what debt the deposit was made (*a*).

(*a*) *Ex parte* Mountfort, *supra.*

And lastly. If there is written evidence attending the deposit of the title deeds, the mortgagee will be intitled to the costs of his petition for a sale; but otherwise it seems not (*a*).

On a review of the decided cases establishing this mode of mortgage security, it is certainly to be regretted, that the old law was not adhered to, and the principle on which the statute of frauds was founded, more respected. For although equity, by declaring the deposit itself to be evidence of an agreement executed, has contrived to evade the strict and literal wording of the statute, yet it is manifest that the door has been unavoidably opened to fraud and perjury; nor does a creditor seem to deserve much favour who will not be at the trouble of a few lines in writing (*b*) if he is desirous to have a charge on his debtor's estate. If the debtor denies that the deposit was intended to cover future advances, as in *ex parte* Mountfort (*c*), or if he insist the deeds were not delivered by way of deposit, but with a different intent, as in Norris v. Wilkinson (*d*), resort must, in many cases, be had to parol evidence; and, as remarked by Lord Eldon (*e*), "the mischief of all these cases is, that the Court is deciding upon parol evidence with regard to an interest in land within the statute of frauds."

(*a*) *Ex parte* Brightens, 1 Swanst. 3. *Ex parte* Trew, 3 Madd. 372. *et vide* Anon. 2 Madd. 281.

(*b*) *Ex parte* Whitbread, *supra*.

(*c*) *Supra*. (*d*) *Supra*.

(*e*) *Ex parte* Mountfort, *supra*.

CHAPTER IX.

Of Welch Mortgages.

WELCH mortgages, as already remarked (*a*), closely resemble the ancient *mortuum vadium* described by Glanville, *viz.* a conveyance of an estate redeemable *at any time* on payment of the principal, with an understanding that the profits in the mean time shall be received by the mortgagee without account in satisfaction of interest (*b*). And this was also formerly a common mode of mortgage in Ireland (*c*). No covenant for payment of the debt on the part of the mortgagor is inserted in the mortgage deed (*d*), and the mortgagee has no remedy to compel redemption or foreclosure in equity (*e*)*. If the amount of rents and profits be excessive, the Court will on bill filed by the mortgagor decree an account, notwithstanding the agreement that the profits shall be retained in lieu of interest (*f*); and probably in the present day the Court would in every instance decree an account against the mortgagee of the rents and profits, whether the value was excessive or not.

(*a*) *Supra*, page 9.

(*b*) *Vide* Talbot v. Braddyl, 1 Vern. 395.

(*c*) Hartpool v. Walsh, 5 B. P. C. 275.

(*d*) Lawley v. Hooper, 3 Atk. 280. King v. King, 3 P. Wms. 361.

(*e*) Howell v. Price, Prec. Ch. 423.

* *Quære.* Whether the mortgagee might not maintain an action of debt on the loan, for every mortgage implies a debt. See King v. King, *supra*. Sed vide *contra*, Howell v. Price, *supra*.

(*f*) Fulthorpe v. Forster, 1 Vern. 477.

In some instances the estate is conveyed to the mortgagee and his heirs, until out of the rents and profits he shall have received principal and interest, which is *in the nature of a Welch mortgage*, and was compared by Lord Hardwicke (*a*) to a tenancy by *elegit*, so that as soon as the principal and interest were satisfied the estate ceased, and the mortgagor might maintain ejectment, unless the mortgagee had remained in possession twenty years after the debt was satisfied, when the statute of limitations would have begun to run; and which circumstance might also probably bar the mortgagor of his equity of redemption on the principle of analogy hereafter noticed (*b*). And his lordship said the mortgagor had the same right as the conusor under the *elegit* had, to come into a court of equity for an account of the rents and profits; nor would the Court relieve the mortgagee from his own contract and agreement of being subject to a perpetual account (*c*). In a similar case, time was held no bar to redemption, although by the mortgagor's own shewing upwards of sixty years had elapsed (*d*).

In Hartpool v. Walsh (*e*), a bill to redeem a mortgage in the nature of a Welch mortgage was dismissed in the Irish Chancery, and on appeal to the

(*a*) Yates v. Hambly, 2 Atk. 362.
(*b*) *Vide infra.*
(*c*) Yates v. Hambly, *supra.*
(*d*) Orde v. Heming, 1 Vern. 418.
(*e*) Hartpool v. Walsh, *supra.*

English House of Lords the judgment was affirmed; but in that particular case a second mortgage had been made, by which the mortgagor had agreed to repay the whole debt at any time *after* 18 *months' notice;* and it was admitted the notice had long since been given, which reduced it to the case of a common mortgage.

In a very recent case (*a*) heard before Lord Eldon, the doctrine of a mortgage in the nature of a Welch mortgage was fully recognized by the Court. The question came on incidentally on a motion, that one of the defendants, who was the executor of the executor of the attorney of the original mortgagee, should leave with his clerk in Court certain drafts or copies of deeds, letters, and papers, which he had by his answer admitted to be in his possession. The circumstances of the case it appeared were these. One Charlton (under whom the plaintiffs claimed) being indebted by judgment to one Rooke in several sums of money did by agreement dated the 18th of April 1747 agree to deliver up possession of the lands to the attorney of Rooke to hold to Rooke as his freehold, until he should have levied and received the amount of his debt. In 1752 Rooke assigned all the premises and the remainder of his debt, to Reed (under whom the defendant Reed claimed, and who was also a judgment creditor of Charlton) and appointed Reed his attorney. Reed entered and was possessed until his death in 1754,

(*a*) Fenwick v. Reed, 1 Mer. 114.

when Christopher Reed (who was residuary devisee, executor and residuary legatee of Reed) entered and was possessed until his death in 1778, on which the trustees and executors of his will entered and were possessed until 1783, when the defendant Reed entered and had been ever since in possession. Charlton died in 1767 intestate, leaving William Charlton his heir at law, who died in 1797, having devised his real estates to the plaintiff Fenwick in trust to sell. In the year 1800, Fenwick filed his bill for an account and to be let into possession, and alleged that at the time Reed first took possession it was agreed between him and Charlton that Reed should retain possession, until not only the debt due to Rooke, but also the debt due to Reed should be paid; that the whole of those debts had been fully paid; that the defendant Reed had kept accounts as mortgagee; that with respect to the objections which might arise from length of time, Charlton could not have had possession until all the debts were paid; that in 1781 a considerable part of the debts remained undischarged; and that since 1783, when the defendant Reed took possession, he had given out, that part of the debts remained unsatisfied. Reed in his answer denied the circumstances from which it was attempted to be inferred that he had treated the transaction as a mortgage, and insisted that from the length of time, a release of the freehold ought to be presumed. He denied his belief of any agreement between his ancestor and Charlton, and alleged that he entered merely as creditor, having a right to redeem against Rooke. He admitted the assignment of 1752 to be in his possession, but said he had no knowledge of

the agreement of 1747 except from the recitals in the assignment. The bill was amended in 1801 and 1803, and answers put in, to which no exceptions were taken. In 1807 the plaintiffs moved to file exceptions *nunc pro tunc*, which was refused with costs. In the same year the bill was again amended, and an answer put in in 1808; from which time no further proceedings appeared until the present motion in 1816. The Lord Chancellor observed, the transaction appeared to be in the nature of a Welch mortgage, and that time would be no bar to redemption, unless it were proved that the party had held over for the space of twenty years after the debt was fully paid and satisfied; that if the assignment to Reed was only until Rooke's debt was paid, it was impossible to say the bar might not be set up in the present case, and in a future stage of the cause it might be just to determine accordingly. But on this point the answer left it doubtful, not only whether Reed took possession under an agreement to pay himself his own debt in addition to Rooke's, but if it did so, whether the amount of both the debts had even yet been satisfied by the perception of rents and profits. The Lord Chancellor then remarked, that if the present was not a case in which length of time alone would operate as a bar to redemption, the question still remained whether there were circumstances to raise the presumption of a release. The weight of long continuance of possession as a ground for such presumption, he observed, must depend most materially on the nature of that possession. And here again, there was no certainty in the case as it then stood, whether the

possession by Reed, after Rooke's debt was paid, was originally adverse; or whether, at first holding by virtue of a distinct agreement with the Charltons, his possession became adverse at some period subsequent to his entering under that agreement. In the latter case, he added, it would be much more difficult to raise the presumption contended for: these were undoubtedly points fit for future inquiry.

It does not appear that this cause has again come before the consideration of the Court.

CHAPTER X.

Of Mortgages by Tenants in tail, and by defective Conveyance.

Instances have occurred in which from the circumstance of the title-deeds being in the custody of a tenant for life in possession, who has refused to permit them to be inspected, or from other circumstances, a mortgage security has been taken from a person as tenant in fee, without fine or recovery, who on further inquiry, or on subsequent inspection of the title-deeds, after the estate has fallen into possession, has proved to be tenant in tail only. In this case if the mortgage be by demise, the mortgagee obtains a term of years determinable by entry of the issue, and if in fee, he obtains a base fee, determinable in like manner (*a*). It was indeed formerly held (*b*) that the estate of the grantee was void on the death of the tenant in tail and not voidable only, but this was overruled by Lord Holt, in Machell v. Clarke (*c*). If the tenant in tail, subsequently to the mortgage and even without reference to it, levy a fine or suffer a common recovery, he will let in the mortgage, although he declare the use of the fine or recovery to a subsequent mortgagee or pur-

(*a*) Machell v. Clarke, 2 Ld. Raym. 778.
(*b*) Tooke v. Glasscock, 1 Saund. 260.
(*c*) *Supra.*

chaser without notice (*a*). If however the first conveyance be in fee, a subsequent recovery will not be valid without the concurrence of the first grantee or his heirs, for want of a good tenant of the freehold (*b*).

The mortgagee may by bill in equity *compel* the mortgagor tenant in tail, to perfect the title, but the Court will not point out *what title* the mortgagor shall make; it will decree him to make such title to the mortgagee as he is capable of doing (*c*). The issue in tail claiming *per formam doni* will not be bound by their ancestor's contract (*d*).

A question has arisen in the case of a tenant in tail *becoming bankrupt* after creating the mortgage and before perfecting the assurance. By the statute 21 James I. c. 19. s. 12. the commissioners of bankrupt are authorized "by deed inrolled to grant, bargain, sell and convey all manors, &c. whereof any bankrupt is or shall be seised of any estate tail, in possession, reversion or remainder to any person or persons *for the benefit of the creditors of such bankrupt*, and that such grants and sales shall be good in law against such bankrupts, the issues of their bodies, and against every person claiming any estate, right, title, or interest under such bankrupts after such time as such persons shall become bankrupt, and

(*a*) Poph. 5-6. Stapilton v. Stapilton, 1 Atk. 8. Tourle v. Rand, 2 B. C. C. 652. Doe v. Whichelo, 8 Term Rep. 214.

(*b*) Vide Watkins on Conveyancing, by Morley and Coote, 108.

(*c*) Sutton v. Stone. 2 Atk. 101.

(*d*) Stapilton v. Stapilton, *supra*.

against every person whatsoever, whom such bankrupts by common recovery or otherwise, might cut off, or bar from any remainder, reversion, rent, profit, title or possibility, into or out of any of the said manors, &c."

It has been questioned whether the bargain and sale of the commissioners will have the like effect, as the fine or common recovery of the tenant in tail, if levied or suffered before he became bankrupt, would have had in letting in the mortgage incumbrance. A variety of cases have decided, that generally speaking, the assignees of a bankrupt stand in the place of the bankrupt himself (*a*), and it would seem to follow, that as the mortgagor, notwithstanding the defect of the assurance, could not have made entry on the premises to defeat the mortgage, the assignees claiming under him must be equally estopped both at law and in equity from disputing the assurance; and that as the bargain and sale would operate as a common recovery, if the mortgagor was tenant in tail in possession and as a fine if he was tenant in tail in remainder, and therefore would, in the first instance, bar the issue and the remainders over, and in the second instance, bar the issue, the mortgage title must, to the extent of the bargain and sale in barring the issue and remainders, be ratified and confirmed.

The contrary was however decided in a case heard

(*a*) Mitford v. Mitford, 9 Ves. Jun. 100. *et vide* 2 Vern. 429. cases in note. Co. Bank. L. 325. 2 Salk. 449, note.

at law before Lord C. J. Lee, and Justices Wright, Foster and Denison (*a*): the question arose on an action of ejectment brought by the assignee of bankrupt tenant in tail, who was then dead but who, prior to his bankruptcy, had mortgaged the lands to the defendant for 500 years. The Court, after admitting that if the tenant in tail had suffered a recovery, he would have let in the mortgage; held, "that the statute of 21 James I. c. 19. s. 12. was made for the benefit of creditors who had no specific lien upon the lands of a bankrupt, and not for any particular creditors, who relied upon the title they accepted; that tenant in tail without suffering a recovery could only affect the estate *for his own life*, and he being now dead *the mortgagee's title was at an end*, and the statute never intended to put the prior incumbrancers on an estate tail, in better case than they would have been if the statute had never been made. It would be very strange to say that this statute, which was most plainly made for the general benefit of all the creditors, should have an effect quite contradictory thereto, viz. to make good a defective title to a particular creditor. It was impossible the legislature could ever intend any such thing, so without saying any more, though this were a new case, yet the Court were all clear of opinion that judgment must be for the plaintiff."

It may be remarked, that in this case the Court

(*a*) Beck v. Welsh, 1 Wils. 276.

seem to have proceeded on the law laid down in Tooke v. Glasscock, rather than in that of Machell v. Clarke, and to have considered the term of 500 years to have *ipso facto* ceased on the death of the tenant in tail, rather than as voidable by entry. It is indeed impossible to reconcile the judgment in Beck v. Welsh, in favour of the plaintiffs in ejectment, with the law in Machell v. Clarke; for if the mortgage term was voidable only and not void, on what principle could *the assignees* make entry in derogation of the act of the person in whose place they stood? Is it not probable, that had the Court in Beck v. Welsh, put that construction on the act of tenant in tail, which, since the case of Machell v. Clarke, has generally been considered to be the right construction, viz. that his assurance was not avoided by his death, but voidable only, the decision would have been in favour of the defendant.

Relief however will be had in equity against the assignees if there is in the mortgage-deed *a covenant for further assurance.* In a case heard before Lord Northington (*a*), it appeared that tenant in tail had executed a trust-deed for the benefit of his creditors, and therein had *covenanted* to convey to the trustees for sale his remainder in tail expectant on the decease of his mother in divers estates; and had covenanted generally for further assurance. A commission of bankrupt was afterwards issued

(*a*) Edwards v. Applebee, 2 B. C. C. 652, note.

against the tenant in tail by one of the creditors, parties to the trust deed, and he and another were chosen assignees, to whom the usual bargain and sale was executed by the commissioners; the assignees filed their bill to set aside the trust deed; the Court directed the parties to try their rights at law; and the trustees obtained a verdict: after this the tenant for life died, and the trustees filed their bill against the assignees to have the estate delivered to them. Both causes came on together, when Lord Northington confirmed the trust deed, and directed the assignees to join in conveying all their estate and interest in the lands to the trustees, or as they should appoint, his lordship being of opinion that *as the estate was bound by a specific covenant for further assurance from the bankrupt*, the trustees were become entitled to that interest which on the bankruptcy and the operation of the law thereon, was then vested in the assignees; and he dismissed the bill filed by the assignees with costs.

It may be observed, that in the last mentioned case there was only a covenant on the part of the tenant in tail to convey, and not an actual conveyance. In Tourle v. Rand (*a*), there was an actual conveyance by tenant in tail in remainder, expectant on his mother's death, to the mortgagee, with a covenant for further assurance. The mortgagor afterwards became bankrupt, without levying a fine or

(*a*) Tourle v. Rand, *supra*.

suffering a recovery. The question agitated in that case was, whether the mortgagee, not having the title deeds, should be postponed to a subsequent mortgagee, to whom they had been delivered after the estate fell into possession. The Chancellor determined he should not, for he could not have compelled the tenant for life to give up the deeds. The counsel for the assignee then contended on the authority of Beck v. Welsh, that the mortgage would be good only during the life of the tenant in tail; to this Lord Chancellor Thurlow replied, "that point does not arise, yet if tenant in tail mortgage and afterwards suffer a recovery, it will make good the former title; *the covenant for further assurance* might be taken hold on as a plank."

The precise point was subsequently heard before Lord Thurlow (*a*). Tenant in tail mortgaged to the plaintiff *in fee*, with covenant for further assurance; the mortgagor became bankrupt; a bill was filed by the mortgagee against the assignees alleging that the plaintiff had discovered since the bankruptcy, that the mortgagor was only tenant in tail, *and that the fee-simple was vested by the bargain and sale in the defendants;* and he insisted that by virtue of the covenant he was entitled to call on the assignees to make further assurance of the premises to him. The assignees, in their answer, submitted to act as

(*a*) Pie v. Daubuz and another, 3 Bro. C. C. 595.

the Court should direct. The counsel for the mortgagee cited Taylor v. Wheeler and Edwards v. Applebee; the assignees relied on Beck v. Welsh. The Solicitor-General in reply urged, that the equity arose from the bankrupt's having agreed that the land should be charged, which agreement would bind the land in equity, and that the plaintiff might call upon the assignees to make good the title by further assurance, just as the bankrupt ought to have done. The Lord Chancellor, after saying that the cases appeared to be directly contradictory, and that the argument of the Court in Beck v. Welsh, did not appear to him satisfactory, and that he should have agreed with Lord Northington in a different construction of the statute, conceiving its object only to be saving the expense of a recovery, and that this effect would be to let in the incumbrance, and to convey not only all that the bankrupt had conveyed but more, and therefore if the case of Beck v. Welsh had not been cited, he should have adopted Lord Northington's construction, ultimately decreed that the defendants should redeem the mortgage or stand foreclosed, and execute a proper conveyance of the premises to the plaintiff and his heirs.

On a review of these cases it is submitted, first, whether the judgment in Beck v. Welsh may not, for the reasons already given, be fairly questioned, whatever weight there may be in the reasoning of the Court as *to the intent* of the statute in favour of

the general creditors; for that reasoning, it should seem, must chiefly avail in case the assurance made by tenant in tail would, without the aid of the bargain and sale, be utterly at an end. If such were the law, it might be fairly considered that it would be going far in favour of the specific incumbrances to the injury of the general creditor, to render a statute made for the benefit of the latter the means of restoring to existence a charge which would otherwise *ipso facto* cease. But if the case of Machell v. Clarke be good law, then the mortgagee's right exists without reference to the effect of the bargain and sale, until determined by the entry of persons having a legal right; and surely that right of entry cannot vest in the assignees, contrary to the course of decisions, by which they are held bound by the acts of the bankrupt; nor indeed is justice on their side, for the personal estate of the bankrupt (and consequently his general creditors) have been benefited to the amount of the money advanced by the specific incumbrancer, and it is not just that they should obtain the double advantage of having the personal assets of the bankrupt augmented by the loan, and of taking the real estate discharged from the incumbrance. The same reasoning of course applies to the case of an absolute purchase. The author however is not aware that the case of Beck v. Welsh has been overruled. Secondly, it may be remarked, that although equity (in order to relieve the mortgagee against the consequences of the decision at law,) has thought it necessary to resort to

the covenant for further assurances as the ground of relief; yet as the assignees would be clearly bound *by a contract* for sale or mortgage entered into by the tenant in tail prior to his bankruptcy attended with payment of the purchase-money, the mortgage deed (not being a complete assurance) might be considered evidence of a contract to convey(*a*); and then the assignees, taking subject to all the equities to which the bankrupt was liable, would be bound to perfect the mortgage whether there was a covenant in the deed for further assurance or not. It is submitted, the distinction between the case of an imperfect assurance by tenant in tail and the case of a defective conveyance hereafter noticed is not very perceptible.

If a mortgage or sale be made by a defective conveyance, such as a feoffment without livery, a bargain and sale without enrollment, or the like, equity will give the mortgagee or purchaser relief against the mortgagor, or, in case of his bankruptcy, against his assignees; for (as remarked by Lord Eldon in Mestaer v. Gillespie) (*b*), the very instrument being only inchoate and not complete to pass the property, is in equity *evidence of an agreement* to convey, and the conscience is bound to make further assurance, that obligation arising from the payment of the

(*a*) See 11 Ves. Jun. 625.
(*b*) Ibid.

money. An instance of this is to be found in the case of Taylor v. Wheeler (*a*), in which a surrender of copyholds by way of mortgage having become void for want of presentment in due time, relief was decreed for the mortgagee against the assignees of the mortgagor who had become bankrupt, and who, Lord Cowper observed, was plainly bound in equity by the defective conveyance, "*et come moy semble* he became a trustee for the mortgagee."

The like relief will also, it is said (*b*), lie for a defective purchaser or mortgagee against subsequent judgment creditors, who, having only *a general lien* on the land, did not *originally* rely on the land for their security, and therefore have not equal equity to have the land applied for payment of their debts. The ruling case cited for this doctrine is that of Burgh v. Francis (*c*), which was however decided under peculiar circumstances, which were as follow. Henry Francis, in consideration of 400*l.* by feoffment, 17 July, 1665, mortgaged to Henry Burgh in fee, *but no livery was made thereon;* and he covenanted for himself and his heirs, that he was lawfully seised in fee of the premises, and for quiet enjoyment free from incumbrances against himself and his heirs, and all persons claiming under him, with covenant for

(*a*) Taylor v. Wheeler, 2 Salk. 449.

(*b*) *Vide* 5 Bac. Ab. 43, *et infra* page 229.

(*c*) Burgh v. Francis, 5 Bac. Ab. 41. Finch Rep. 28. Nelson Rep. 183.

further assurance. Francis, in 1670, made his will, and thereof appointed Henry Francis his son executor. Afterwards Robert Burgh died, and the plaintiff Eleanor proved his will. The defendant Henry Francis confessed judgments on bonds entered into by his father, viz. several as heir and one as executor to his father. One of these judgments was obtained by Heyman, a defendant in an action brought in Hilary Term 1670, for 400*l.* and all the other judgments were entered about the same time. This cause came to be heard by Sir Heneage Finch, Lord Keeper, assisted by Judge Wyld, who declared that the Court was fully satisfied that the plaintiff ought to be relieved, and that the said judgments ought not to incumber the premises till the mortgage money was fully paid, wherein the Court did not ground its judgment upon the manner of obtaining the judgments all in a term and most of them together, nor on the special way whereby the heir charged the lands by pleading *riens per descent*, nor on the priority of the teste of the subpœnas before the teste of the originals on which the judgments were grounded, but upon the true nature of the case, the Court declared that the debt due by the mortgage did originally charge the lands, which the bonds did not till they were reduced to judgments; and it ought not to be in the heir's power, by confessing judgments to charge the lands in prejudice of that equity, and the rather because of the covenant for further assurance; and though the mortgage was defective in law for want of livery, yet equity, which supplied

that defect, charged the lands; and though the creditors had no notice, yet they shall be bound in this case, because they are put in no worse condition than they ought to be, viz. to be postponed to the mortgage. Therefore, it was decreed that the defendant Henry should convey to the plaintiff, or her assigns in fee, in manner as a master should direct, but redeemable on the payment of the said 400*l.* due on the former defective mortgage, and the premises to be held quietly against the plaintiffs, and all claiming under them since the date of the mortgage; and he who had the equity of redemption might in convenient time bring a bill to redeem; and in default thereof the plaintiffs might bring one to foreclose, and a perpetual injunction was also awarded to quiet the plaintiffs and their assigns in possession against all the defendants and the aforesaid incumbrancers, and to stay all proceedings at law.

To this case in Bacon's Abridgment (*a*) the following reasoning is subjoined.

"From this case, which hath been a governing case in the Courts of Equity, they have stated the difference before-mentioned, for these *bond creditors* did not originally pitch upon the land as a pledge and security for their money; and when they came afterwards and reduced their securities into judgments to affect the lands; yet since they affect it in

(*a*) Vol. V. p. 42.

the hands of the heir, who was subject to this equity, and obliged in conscience to supply the defect in the execution of the deed, they can only stand in his place, and therefore must be subject to the defective security. But otherwise it had been if there had been a subsequent mortgage duly executed, and without notice of the former; because the lands being then originally pledged for the money, and the mortgagee having the legal title, the defective securities that could not prevail at law should not overturn in equity a security that was equally upon valuable consideration. But *the bonds* in the former case did not originally take hold of the land at all; and when they were reduced to a judgment they only took hold of the land together with other things; and therefore equity doth not look on them as such charges on the land as are to take hold so immediately on it, that a prior defective security is not to be relieved and set up against them, especially since such incumbrancers did not take the land as an original security, but came in afterwards under the person who was obliged in conscience to supply that defect; for the difference between the two cases turns upon this, that in the case of a second valid mortgage we must in all manner of justice suppose that the mortgagee would not have lent if the land had not been offered to secure his money; and therefore when he hath the title at law it is no equity to overturn it, or to postpone him to a defective security. But in the case of *the bonds* the obligees lent their money upon the personal security, and not on the credit of lands, and therefore when they come to affect the lands they must stand in the

place of the person that had made himself liable in a Court of Equity to answer and make good the defective security*."

Mr. Powell, in his Treatise on Mortgages (*a*), seems to have considered, that even if the second mortgagee have *notice* of the prior defective mortgage he must prevail against the first mortgagee, because, he says, the legal title was *ab initio* in the second mortgagee, and equity will not interfere to wrest it from him where both are equally upon a valuable consideration; and he considers the next mentioned case to have been decided upon this ground, for, he says, unless the subsequent purchaser for a valuable consideration, in that case could have been charged with fraud by reason of notice, there appears to be no pretence upon which the prior purchaser for valuable consideration likewise, but whose title was defective, could

* It may perhaps be fairly doubted whether the case of Burgh v. Francis can be considered an authority for the general doctrine, that equity will in every case postpone a subsequent judgment creditor to a prior defective mortgagee. And it is submitted, there are forcible arguments to the contrary of such a doctrine; for in the first place, as observed by Mr. Fonblanque, (Vol. I. Treatise on Equity, 38.) the general rule is, that a Court of Equity will not interpose in prejudice of a defendant having a legal interest for a valuable consideration, and without notice of the plaintiff's equity. And secondly as the defect arises from the neglect of the mortgagee himself, he would not appear entitled to much favor in equity, to the prejudice of a more prudent creditor. The point however must be left to the learned reader's judgment.

(*a*) Page 538, 4th edition, *et vide* 1 Eq. Ca. ab. 320. S. P.

apply for relief, because, as between two purchasers upon the like considerations, that which has the complete title in law must prevail.

In this view of the case, however, Mr. Powell was certainly mistaken, for a mere statement of the circumstances will shew that both parties were not only equally upon a valuable consideration but had also *equal equity*, which would not have been the case had the second mortgagee taken *with notice* of the first incumbrance, and in fact it is expressly stated that he had *not* notice. The circumstances were (*a*), Richard Wiseman, son and heir apparent of Sir Richard Wiseman, intermarried with Winefred Barrington, entitled to a portion of 4000*l.*, and brought his bill against the trustees of his wife; whereupon a decree was had to pay unto him the fortune of his wife, upon making a competent settlement, and upon failure thereof the fortune to be invested in lands by the approbation of the master. But upon the master's report that no competent settlement could be made by Richard the son, it was by choice of parties invested in lands of Sir Richard the father of equal value, part of which lands happened to be eight acres of copyhold, which in the settlement were limited and declared apart from the freehold to be to the use of the issue of the marriage, in common form and afterwards in fee to the son, *with a covenant* from Sir Richard to surrender the copyhold. The wife died without issue, and the son for a valuable consideration, mortgaged both copyhold and freehold together to Oxwick and others,

(*a*) Oxwick v. Flumer, 5 Bac. Ab. 43.

plaintiffs, but without any surrender. The son died, and the lands descended to Elizabeth, his sister and heir at law. The mortgagees foreclosed Elizabeth by a decree of the Court, and entered and took possession; to whom, being in possession, Elizabeth released and confirmed the estate in fee. Sir Richard, the father, being out of possession of the premises from the time of the settlement, which was made thirteen years past, surrendered the copyhold land to the defendant Plumer for a valuable consideration. Plumer was admitted, and brought his ejectment; and the mortgagees brought their bills to be relieved. The Master of the Rolls, on solemn argument, dismissed their bills with costs; and held that the Court would not supply the defect of a surrender against a person that came in by title upon surrender of the same premises. The case coming on to be reheard before Lord Cowper, he was of the same opinion; and he took this difference, that when there are two persons that *have equal equity*, those that have the legal title shall prevail, because there is no equity to take from such persons the title that they have gained at law; as where A. B. and C. are three mortgagees, and C. purchases in the mortgage of A. to secure his own money *bonâ fide* lent, equity will never take from him the legal interest he hath gained (*a*). But if the contending parties in equity *have not equal equity, then those that have the greatest equity shall prevail against the legal title*, as if a creditor takes hold of the land by a feoffment in mortgage without livery, equity will supply the

(*a*) *Sed vide infra* page 235.

defective conveyance against a subsequent judgment creditor, because the judgment creditor not relying on the land for his security, he hath not equal equity to have it applied for the payment of his debt as he that took it in mortgage (*a*). But in the principal case, where Plumer had equally lent money, and taken hold of the estate by a mortgage made with a legal surrender, so that the legal interest was in him, the covenant to surrender (though prior) could not be set up against him *who had no notice of it,* but Oxwick must pursue his remedy at law for the breach of the covenant.

And indeed a case which is afterwards animadverted upon by Mr. Powell, though on a different subject, was decided against a subsequent purchaser, on the ground of notice of the prior defective mortgage (*b*). In that case it appeared that a surrender of copyholds had been made by way of mortgage, which had become void for want of presentment. Afterwards Blincowe (one of the defendants) agreed with the mortgagor for the purchase of the copyholds, and took a surrender in the name of Moore (another of the defendants) who afterwards agreed to become the purchaser, and paid the purchase-money without notice of the mortgage, and was admitted. On a bill filed by the executor of the mortgagee, Moore pleaded he was a purchaser for a valuable consideration without notice; but it was proved that Blincowe had notice of the mortgage, and it was adjudged that

(*a*) *Vide supra,* page 227, note.

(*b*) Jennings v. Moore and Others, 2 Vern. 609.

although Moore had not notice of the mortgage, nor employed Blincowe originally as his agent, yet his subsequent approval of the contract made Blincowe his agent *ab origine* so as to affect him with notice, and he was decreed to pay the 400*l.* and interest, or to surrender to the plaintiff. In this case, the principle contended for is clearly recognized, although the propriety of its application may be doubted.

The result of the cases seems to be, first, that if a mortgage be made by tenant in tail without fine or common recovery, and he afterwards levy a fine or suffer a common recovery, though to different uses, he will let in the incumbrance. But if he become bankrupt before perfecting the assurance, then, according to the case of Beck v. Welsh, the assurance will at law cease at his death, although the soundness of that decision may be fairly questioned.

Secondly. If tenant in tail make a mortgage without fine or recovery, he may be compelled by bill in equity to perfect the assurance.

Thirdly. If tenant in tail become bankrupt before perfecting the mortgage security, and there is a covenant for further assurance in the mortgage deed, equity will hold the assignees bound to make good the defective security, and will decree them to redeem or be foreclosed, and to convey to the mortgagee.

Fourthly. The like will be the case in the instance of a defective assurance made by tenant in fee or

other person having an absolute interest, even without a covenant for further assurance, on the general equity between the parties.

Fifthly. It is said that creditors, having a subsequent valid security, but amounting only to a general lien on the estate (such as a judgment) will be also bound by the prior defective conveyance as their security did not *originally* affect the lands; as will also a subsequent mortgagee, who has obtained an actual valid assurance, but *with notice* of the prior defective mortgage.

Sixthly. It is doubtful whether equity will (as against the assignees) relieve a mortgagee who takes a defective assurance from a tenant in tail without a covenant for further assurance.

Lastly, it is clear that a subsequent mortgagee *without notice* will have preference both at law and in equity to the defective assurance, whether taken from a tenant in fee or tenant in tail, or any other person.

It is hardly necessary to repeat, that a defective assurance made by tenant in tail will not bind his issue inheritable under the entail at law or in equity, whether there be a covenant for further assurance or not (*a*).

(*a*) Stapilton v. Stapilton, 1 Atk. 9. Fox v. Crane, 2 Vern. 306. Saville's case cited in Attorney-General v. Day, 1 Ves. 224. and in Hinton v. Hinton, 2 Ves. 632. Hayward v. Stillingfleet, 1 Atk. 423.

CHAPTER XI.

Of Mortgages of Advowsons, Church Livings, Rectories impropriate, and Tythes.

An advowson is by no means an eligible subject for mortgage, for it produces no profit. It has been already mentioned (*a*) that on the living becoming vacant, the mortgagor has a right to nominate, and may compel the mortgagee to present his nominee, although there be an express agreement between them to the contrary (*b*), and this doctrine applies whether the advowson be appendant or in gross (*c*).

As the mortgagee cannot present on an avoidance, it has been recommended that he should file his bill in equity for a sale (*d*). But it is submitted that even under the direction of a Court of Equity, a sale of an advowson cannot be made while vacant, so as to carry the next turn to present, contrary to the decided cases in matters of simony.

If the mortgagee presents, and his clerk is inducted, the mortgagor may file his bill to compel resignation, but the bill must be filed within six months from the death of the last incumbent, or it will be dismissed (*e*). A mortgage of an advowson

(*a*) *Supra*, 59., and the cases there cited.
(*b*) Mackenzie v. Robinson, 3 Atk. 558.
(*c*) Ibid. *supra*.
(*d*) Ibid. *supra*.
(*e*) Gardiner v. Griffith, 2 P. Wms. 404.

should always include a power of sale and be made in fee.

The 13 of Eliz. cap. 20. enacted, that no lease of any benefice with cure, should endure longer than while the lessor should be resident and serving the cure of such benefice, without absence above eighty days in any one year, &c. "and that all chargings of such benefice with cure thereafter, with any pension or with any profit out of the same, to be yielded and taken thereafter to be made, other than rents to be received upon leases thereafter to be made, according to the meaning of that Act, should be *utterly void.*" By the 3 Car. I., cap. 4. sec. 2. this Act was made perpetual.

In a case in the King's Bench (*a*), it appeared that an annuity had been granted out of a rectory, with a demise for a term of years to a trustee for securing it, and with a covenant and warrant of attorney to confess judgment as collateral securities. The judgment had been entered up, and a *fi. fa. de bonis ecclesiasticis*, and a *capias ad satisfaciendum*, obtained. On a rule to shew cause, why the grantor should not be discharged out of execution, and the deed and warrant of attorney and judgment vacated, and the *fi. fa.* set aside, it was argued for the grantee that allowing the grant to be void within the statute, the covenant and warrant of attorney were good. On the other hand it was urged, that the grant was void

(*a*) Mouys v. Leake and another, 8 Term Rep. 411.

by the common law, the canon law, and the statute law, and that if the grant was void, the covenant and warrant of attorney, being collateral securities for the same annuity, were void also. Lord Kenyon in delivering the judgment of the Court, said, that he was not prepared to say, that the statute of the 13 Eliz. cap. 20. might not extend to that case, but he denied the consequence, that therefore the present rule must be made absolute; for even admitting that every thing that was done by the defendant to charge or affect the living was absolutely void, still the defendant's argument was not true in its extent: for if it were so, what was to become of all the process *de bonis ecclesiasticis?* The transaction was not *malum in se;* and a deed which was intended to operate one way, might operate another way, *ut res magis valeat quam pereat,* if honesty required it; then why might not the deed have effect as a personal security against the grantor, containing as it did a covenant to pay the annuity? His lordship said, he would not however give any judicial opinion, whether or not the deed was void by the statute of Elizabeth, *which certainly contained some very strong expressions.*

It appears remarkable, that the objection taken to the annuity, in the case of Mouys v. Leake, viz. that the charge was *ipso facto* void under the statute, does not seem to have been urged in some preceding cases relating to the same subject. Thus, in a case before Lord Mansfield (*a*), a creditor was in posses-

(*a*) Doe v. Mears, Cowp. 129.

sion under a sequestration; an annuity creditor brought ejectment upon a prior demise of the rectory for securing the annuity; the judgment creditor pleaded, that the demise was avoided by 80 days' non-residence of the rector, and judgment was given accordingly; but it does not appear, that either the court or the bar considered the grant to be absolutely void *independently* of the non-residence; the like observation applies to a case in Ambler (*a*), in which a mortgagee of a rector's stipend, settled by Act of Parliament in lieu of tithes, and collected by an assessment on the inhabitants, and assigned by the rector to the mortgagee, was preferred to subsequent judgment creditors who had obtained sequestration.

By the 43d of Geo. III. cap. 84., the 13 Eliz. cap. 20. and 3 Car. 1. cap. 4. sec. 2. were wholly repealed. The 57 Geo. III. cap. 99. has repealed the 43 Geo. III. cap. 84. and also repealed part of the 13 Eliz. cap. 20. but has not repealed in terms the clause relating to the charging of livings, and therefore if that clause is to be considered an independent clause and operating in the mode contended for in Mouys v. Leake, it is submitted that a question may still arise, whether by the repeal of the 43 Geo. III. cap. 84., and only a partial repeal of the 13 Eliz. cap. 20. not extending to the charging clause in that Act, the

(*a*) Errington v. Howard, Amb. 485, *et vide* Doe v. Barber, 2 Term Rep. 749. Brown v. Rose, 6 Taunt. 123. Arbuckle v. Cowtan, 3 Bos. and Pull. 321.

prohibition against the incumbering of church livings has not revived, except by way of sequestration. To avoid this doubt, a charge upon a benefice should always be attended by a warrant of attorney to confess judgment and sequestrate the living.

It is usual to make the charge by demise for a term of years if the incumbent shall so long live, with a covenant that he will not resign or do any act to vacate the living without the consent of the incumbrancer, and that if he is promoted, he will forthwith, at his own costs, execute a deed charging his new benefice with the incumbrance (*a*).

Rectories impropriate and tythes in lay hands are subject to the like mode of mortgage as any other species of real estate.

(*a*) For a precedent of such a covenant, see Appendix, No. 5.

CHAPTER XII.

Of Mortgages of the Equity of Redemption.

The nature of an equity of redemption, its rights and incidents have been already explained (*a*).

It has been shewn, that although at first it was contended that an equity of redemption was a mere *right*, yet that equity adhering to the principles of the civil law, which considered the borrower the owner of the pledge until debarred by judicial sentence and looking at the substance and not at the form of things, held the mortgagor, as in the civil law, the real owner of the land until decree of foreclosure, and possessed of it in his ancient and original right, and consequently that the equity of redemption was *an estate* in the land, and the person entitled to it the real owner of the land, and the mortgage personal assets.

An equity of redemption therefore, as already explained (*b*), being the ancient estate in the land, may be itself the subject of mortgage *toties quoties*, until equity debars the mortgagor of his equitable estate.

(*a*) *Vide* Book 1. cap. 4.
(*b*) *Supra*, 42.

As between mere equitable incumbrancers, it is a maxim in equity, *qui prior est tempore potior est jure* (*a*). On this principle, each mortgagee of the equity of redemption has preference according to his priority in time (*b*).

But as remarked by Mr. Fonblanque (*c*) this rule is applicable to *mere equities*, for there is another important principle that must be borne in mind, viz. that where equities are equal, the law must prevail (*d*), of which more will be hereafter said in its proper place in the chapter on the equitable doctrine of tacking. Equity therefore will not deprive a *bonâ fide* mortgagee of an advantage obtained by him *at law* by a conveyance of the legal estate, or an assignment of a prior judgment or statute (*e*) provided he did not obtain the conveyance of the legal estate after a decree to account, and provided at the time of advancing his money he had not notice of the mesne incumbrancer, although he should afterwards obtain notice of the charge, prior to obtaining his legal protection (*f*). In the case, however, of a vendee advancing his money on a contract for sale, notice of a prior equitable charge before the conveyance, will, it is said, bind him (*g*).

(*a*) *Supra*, 60.

(*b*) Brace v. Duchess of Marlborough, 2 P. Wms. 294.

(*c*) *Vide* 1 Fonb. 320.

(*d*) Francis' 14th Maxim.

(*e*) *Vide* Brace v. Duchess of Marlborough, *supra*.

(*f*) See Wortley v. Birkhead, 2 Ves. 573.

(*g*) *Vide* Wigg v. Wigg, 1 Atk. 382. and 3 P. Wms. 306. note.

The consequence of the before mentioned rule in equity, viz. that where equities are equal, the law must prevail, is, that a mortgagee of the equity of redemption may be postponed to a subsequent mortgagee, who having advanced his money without notice, afterwards (although then with notice) obtains possession of the legal estate. From this results a disadvantage and even danger in taking a mortgage of an equity of redemption, against which it is difficult to guard. An idea was indeed thrown out by Lord Eldon in Mackreth v. Symmons, which if established as law would afford great protection to the first equitable mortgagee, viz. that notice given to a first mortgagee shall affect the third mortgagee, who having advanced his money without notice of a second mortgage shall afterwards pay off the first mortgage. If this be law then a mortgagee of the equity of redemption may protect himself by express notice given to the first mortgagee, which notice will effectually prevent a third mortgagee from availing himself of a transfer made to him of the legal estate (*a*).

Another disadvantage attending a mortgage of an equity of redemption is, that the first mortgagee may, previously to the second mortgage, or even subsequently to it if without notice, make further advances to the mortgagor, all of which (as also judgment or statute debts) (*b*), he will, as hereafter ex-

(*a*) *Vide infra* chapter notice *et quære.*

(*b*) Brace v. Duchess of Marlborough, *supra.*

plained, be entitled to tack to his original mortgage in preference to the subsequent mortgagee. To guard against this mischief, it is incumbent on a person lending money on an equity of redemption first to make inquiry of the prior mortgagee into the amount of his demand, and secondly to give him express notice of the proposed mortgage. And it will be advisable *if practicable*, *i. e.* if the first mortgagee will permit, to put notice of the second mortgage on the principal title deed, such as the conveyance to the mortgagor or the like, for otherwise the mortgagor might redeem the first mortgage and convey the legal estate to a stranger without notice who would thus gain a preference to the prior equitable mortgagee.

Another disadvantage attending a mortgage of an equity of redemption is that if the mortgagor shall afterwards redeem and take a conveyance to himself, he will, it may be thought, let in his widow's right to dower, and even his judgment and statute creditors, in preference to the equitable mortgagee (*a*).

A further disadvantage is that the mortgagee has no legal remedy, so far as respects the estate, for enforcing payment of principal or interest, but is driven for relief to his suit in equity.

Another disadvantage, against which no prudence can guard, is that the mortgagor may secretly have

(*a*) *Sed quære et vide supra*, page 223.

executed prior mortgages of the equity. For so gross a fraud the legislature has enacted his right of redemption shall be utterly lost. The 4 and 5 Wm. 3. c. 16. after reciting that great frauds and deceits are too often practised by necessitous and evil disposed persons in borrowing money, and giving judgments, statutes, and recognizances privately, for securing the repayment of the said money, and the same persons do afterwards borrow money upon security of their lands of other persons, and do not acquaint the latter lender thereof with the same, whereby such late lender is very often in danger to lose his whole money, or forced to pay off the debts secured by the said judgments, statutes, and recognizances before they can have any benefit of the said mortgages; and that divers persons do many times mortgage their lands more than once without giving notice of their first mortgage, whereby lenders of money upon second or after mortgages do often lose their money and are put to great charges in suit and otherwise, enacts, "That if any person shall borrow any money or for any other valuable consideration, for the payment thereof, voluntarily give, acknowledge, permit, or suffer to be entered against him or them one or more judgment or judgments, statute or statutes, recognizance or recognizances to any person or persons, creditor or creditors, and if the said borrower or borrowers, debtor or debtors, shall afterwards take up or borrow any other sum or sums of money of any other person or persons, or for other valuable consideration become indebted to such person or persons, and for securing the repayment and discharge thereof, shall mortgage his her or their

lands or tenements or any part thereof to the said second or other lender or lenders of the said money, creditor or creditors, or to any other person or persons in trust for or to the use of such second or other lender or lenders, creditor or creditors, and shall not give notice to the said mortgagee or mortgagees of the said judgment or judgments, statute or statutes, recognizance or recognizances in writing under his, her, or their hand or hands before the execution of the said mortgage or mortgages, unless such mortgagor or mortgagors, his, her, or their heirs upon notice to him, her, or them given by the mortgagee or mortgagees of the said lands and tenements, his, her, or their heirs, executors, administrators, or assigns in writing under his, her, or their hands and seals attested by two or more sufficient witnesses, of any such former judgment or judgments, statute or statutes, recognizance or recognizances, shall within six months pay off and discharge the said judgment or judgments, statute or statutes, recognizance or recognizances, and all interest and charges due thereupon, and cause or procure the same to be vacated or discharged by record, that then the mortgagor or mortgagors of the said lands and tenements, his, her, or their heirs, executors, administrators, or assigns shall have no benefit or remedy against the said mortgagee or mortgagees, his, her, or their heirs, executors, administrators, or assigns, or any of them, in equity or elsewhere, for redemption of the said lands and tenements, or any part thereof, but the said mortgagee and mortgagees, his, her, or their heirs, executors, administrators, and assigns, shall and may hold and enjoy the said lands and tenements for such

estate and term therein as were or was granted and settled to the said mortgagee or mortgagees against the said mortgagor or mortgagors, and all person and persons lawfully claiming from, by, or under him, her, or them freed from equity of redemption, and as fully to all intents and purposes whatsoever, as if the same had been purchased absolutely and without any power or liberty of redemption." And further, "that if any person shall mortgage any lands or tenements to any person or persons for security of money lent or otherwise accrued, or become due, or for other valuable considerations, and if the said mortgagor or mortgagors shall again mortgage *the same lands or tenements or any part thereof* to any other person or persons for valuable consideration (the said former mortgage being in force and not discharged) and shall not discover to the said second or other mortgagee or mortgagees or some or one of them, the former mortgage or mortgages in writing under his, her, or their hands, that then and in those cases also, the said mortgagor or mortgagors, his, her, or their heirs, executors, administrators, or assigns, shall have no relief on equity of redemption against the said second or after mortgagee or mortgagees, his, her, or their heirs, executors, administrators, or assigns, upon the said after mortgage or mortgages, but that such mortgagee or mortgagees, his, her, or their heirs, executors, administrators, and assigns, shall and may hold and enjoy such more than once mortgaged lands and tenements for such estate and term therein as were or was granted and conveyed by the said mortgagor or mortgagors, against him, her, or them, his, her, or their heirs, executors, or administrators re-

spectively, freed from equity of redemption, and as fully to all intents and purposes as if the same had been an absolute purchase, and without any power or liberty of redemption."

But it provides that "if it shall so happen that there be more than one mortgage at the same time made by any person or persons, to any person or persons, *of the same lands and tenements*, the several late or under mortgagees, his, her, or their heirs, executors, administrators, or assigns shall have power to redeem any former mortgage or mortgages upon payment of the principal debt, interest, and costs of suit to the prior mortgagee or mortgagees, his, her, or their heirs, executors, administrators, or assigns. And also, that nothing in the act contained shall be construed to bar any widow of any mortgagor of lands or tenements from her dower and right in or to the said lands, who did not legally join with her husband in such mortgage, or otherwise lawfully bar or exclude herself from such her dower or right.

It will be seen that the language of the statute is confined to a second mortgage *of the same lands*, and that the legislature does not appear to have contemplated that other estates might be also comprized in the second mortgage. To such cases, it has been held, the statute being penal does not apply (*a*), unless the property joined with the equity of redemption is so inconsiderable that its introduction into the mort-

(*a*) Stafford v. Selby, 2 Vern. 589. Eq. Ca. Ab. 320. Pl. 5.

gage was palpably fraudulent, and for the mere purpose of affording a pretext for the evasion of the statute. The case of Stafford v. Selby also determined, that to comply with the directions of the statute, the mortgagor must give the second mortgagee notice in writing under his hand of all the prior incumbrances; and that an assignee of the second mortgage, as well as a subsequent mortgagee redeeming the second mortgage, has the benefit of the statute. But that to entitle a second mortgagee to the advantage of the statute, he must come into court with clean hands and free from fraud.

The reader will, of course, not confound a legal reversion expectant on a mortgage term with an equity of redemption. It has been already explained (*a*), that the former is legal, and the latter equitable assets. To a mortgage in fee therefore after a mortgage for a term of years, the preceding remarks do not apply, for such a mortgage will of course take precedence of mere equitable incumbrances. But even to a mortgage of such a nature, without some degree of precaution, a degree of hazard attaches, for the first mortgagee may continue to make advances to the mortgagor after the date of the mortgage in fee, either on his original security, or on judgment or statute security (*b*); all of which he will be entitled to tack, unless he had notice of the second mortgage; and even a subsequent mortgagee of the mere equity

(*a*) *Supra*, 57.

(*b*) Brace v. the Duchess of Marlborough, *supra*.

of redemption might obtain an advantage over the mortgagee of the legal reversion, by procuring an assignment of the first mortgage to which he might tack his equitable charge if he had not notice of the intervening mortgage at the time of advancing his money. To guard against the first of these dangers, it is proper for the mortgagee of the legal reversion to make the like inquiries of the mortgagee of the term, and to give him the like notice as above mentioned in the case of a mortgage of the equity of redemption. And against the second danger, he would be in part likewise protected by the notice to the first mortgagee if the principle suggested by Lord Eldon in Mackreth v. Symmons be law.

It is also proper here to remark that, although it has been decided (*a*) that an equitable mortgage is not within the general order of the 8th of March, 1794 (*b*), for sale of the mortgage premises on application by the mortgagee, to the commissioners of bankrupt; yet it must be understood, that the decision in question does not apply to an actual mortgage either of a trust estate, or of an equity of redemption, but to that class of cases in which the mortgage arises from the inference of equity, such as an equitable mortgage by deposit of title deeds and the like; or in other words, that it does not apply to a mortgage of the equity, but to an equitable mortgage.

(*a*) *Ex parte* Payler, 16 Ves. Jun. 434.

(*b*) See Appendix, No. VI.

CHAPTER XIII.

Of Equitable Lien on Landed Estate.

If a vendor convey his estate to the vendee without receiving payment of any or having received part only of the purchase-money, although the consideration is upon the face of the instrument expressed to be paid, and by a receipt indorsed on the deed acknowledged to be received (*a*), in equity the vendee becomes a trustee for the vendor for the amount of the money unpaid (*b*), and the vendor has, *by an implied contract* between him and the vendee, *an equitable lien* on the estate for the amount of the money (*c*). In like manner, if a vendee advance all or any part of the money to the vendor, and the contract is broken off, an implied contract arises, by which the vendee has a lien on the land (*d*). And the lien will, in either case, bind the lands in the hands of the party himself and his heirs, and also

(*a*) See Mackreth v. Symmons, 15 Ves. Jun. 337. Coppin v. Coppin, 2 P. Wms. 291. But the receipt is conclusive at law unless merely fraudulent. Rowntree v. Jacob, 2 Taunt. 141.

(*b*) Pollexfen v. Moore, 3 Atk. 272. Blackburn v. Gregson, 1 B. C. C. 424.

(*c*) Blackburn v. Gregson, 1 B. C. C. 420. Mackreth v. Symmons, 15 Ves. jun. 349. Cowell v. Simpson, 16 Ves. jun. 279. Smith v. Hibbard, 2 Dick. 740. Harrison v. Southcote, 2 Ves. 389. Chapman v. Tanner, 1 Vern. 267.

(*d*) See Burgess v. Wheate, 1 Bl. 150. Lacon v. Mertins, 3 Atk. 4.

of volunteers, and *bonâ fide* purchasers *with notice* claiming under him (*a*). But this implied contract may be rebutted by clear and irresistible evidence shewing the intention of the parties, that the estate shall not be a security for the money (*b*). The questions in the books relating to equitable liens on real estate have principally turned on this point.

In the older cases (*c*) it seems to have been considered that the taking of any security, although merely personal, such as a bond, promissory note, or the like, was proof of the intention of the parties, that the lien should not subsist, and even so late as in the case of Nairn v. Prowse (*d*), the master of the rolls considered the point as still open. The contrary however is now determined, and it is settled that a mere personal security, whether a bond (*e*), bill of exchange (*f*), promissory note (*g*), or the like, without more (*h*), will not of itself be sufficient to remove the equitable lien.

The difficulty is in ascertaining what act is suffi-

(*a*) Mackreth v. Symmons, 15 Ves. jun. 337. Walker v. Preswick, 2 Ves. 622. Elliot v. Edwards, 3 Bos. and Pull. 183. Gibbons v. Baddall, 2 Eq. Ca. 682.

(*b*) 15 Ves. jun. 341.

(*c*) Fawell v. Heelis, Amb. 724. 1 B. C. C. 422. note. 2 Dick. 425. Bond v. Kent, 2 Vern. 281. 1 Fonb. 153.

(*d*) 6 Ves. jun. 752.

(*e*) Hearn v. Botelers, Cary Rep. Cha. 25.

(*f*) Hughes v. Kearney, 1 Sch. and Lef. 136. Grant v. Mills, 2 Ves. and Bea. 309. *Ex parte* Peate, 1 Madd. 346.

(*g*) Gibbons v. Baddall, *supra*.

(*h*) Mackreth v. Symmons, *supra*.

cient for such purpose short of an express agreement. Lord Eldon in Mackreth v. Symmons (*a*) observes, "the more modern authorities upon this subject have brought it to this inconvenient state: that the question is not a dry question upon the fact, whether a security was taken, but it depends upon the circumstances of each case, whether the court is to infer that the lien was intended to be reserved, or that credit was given, and exclusively given, to the person from whom the other security was taken." In Nairn v. Prowse (*b*) the vendee transferred long annuities, with an agreement that if the price did not rise within two years, so that the stock might be sold for 2200*l.*, the vendee would make good the deficiency. The stock sold for less than 2200*l.*; the vendor claimed a lien for the difference; but the master of the rolls thought this transaction a sufficient evidence of intention that the lien should not subsist. Of this decision, Lord Eldon in Mackreth v. Symmons hardly seems to approve, considering that a vendor might be inclined to give a vendee a chance of the benefit of the rise without parting with the equitable lien (*c*).

A mortgage of other lands for the whole or part of the purchase-money (*d*), or a mortgage of the purchased estate for part of the purchase-money, permitting the rest to remain on personal security (*e*), has

(*a*) 15 Ves. jun. 350.
(*b*) 6 Ves. jun. 752.
(*c*) 15 Ves. jun. 349.
(*d*) Nairn v. Prowse, *supra*.
(*e*) Bond v. Kent, 2 Vern. 281.

also been thought sufficient for the purpose of discharging the equitable lien on the purchased estate in the first instance wholly, and in the second instance to the amount of the money remaining on the personal security. But the former, Lord Eldon does not seem to hold quite conclusive (*a*), notwithstanding the opinion of the master of the rolls in Nairn v. Prowse, that it could be hardly thought it was intended the party should have a double mortgage. The latter may certainly be admitted to carry almost irresistible evidence of intention that the money on the personal security should not form a lien on the estate.

Mr. Sugden in his Treatise on Vendors and Purchasers (*b*) appears to think, that the doctrine of equitable lien extends to the case of an estate sold in consideration of an annuity secured by bond or covenant; and cites, as an authority, the case of Tardiff v. Scrughan (*c*) heard before Lord Camden, in which a father conveyed his estate to his two daughters as joint tenants in fee in consideration of an annuity secured by their joint bond; one daughter conveyed her moiety to her husband for life, and it was decreed the husband should keep down a moiety of the annuity. But it is submitted, that the cases of an annuity and of the purchase-money remaining wholly or in part unpaid, are not analogous; the

(*a*) 5 Ves. jun. 341.
(*b*) Page 442, 4th Edit.
(*c*) 1 B. C. C. 423.

equity in the latter case arises from a *contract unexecuted* or only in part performed, which converts the vendee into a trustee; but in the case of the annuity the contract is *executed* when the security is given. Equity no longer has ground for its jurisdiction, and it is impossible to conceive an implied contract for the security of the annuity on the land, contrary to the clear and avowed agreement of the parties carried into full execution, that it shall be secured by bond or covenant. Lord Eldon in Mackreth v. Symmons (*a*) disapproved the doctrine, and decided in opposition to it. We may therefore now consider that in the case put of an annuity secured by bond or covenant, a lien does not subsist on the purchased estate.

A question is also raised by Mr. Sugden (*b*), *viz.* whether the equity extends to affect third persons, as to give the vendor a preference to a subsequent equitable mortgagee with deposit of title deeds. He considers the case of Stanhope v. Earl Verney (*c*), to be analogous, in which Lord Northington held, that a declaration of trust of a term in favour of a person, was tantamount to an actual assignment, unless a subsequent incumbrancer, *bonâ fide* and without notice, procured an assignment; and that the custody of the deeds respecting the term, with a declaration

(*a*) 15 Ves. jun. 352.
(*b*) Vendors and Purchasers, p. 452. 4th Edit.
(*c*) Butler's Note, 1 Co. Litt. 290, b.

of the trust of it in favour of a second incumbrancer, was equivalent to an actual assignment of it, and therefore gave him an advantage over the first incumbrancer, which equity would not take from him. Upon the authority of this case, he seems to think, an equitable mortgage, by deposit of title deeds to a person *bonâ fide*, and without notice, will give him a preferable equity, and will overreach the vendor's equitable lien on the estate for any part of the money.

Without entering into the question of the soundness of the doctrine in the case of Stanhope v. Earl Verney (*a*), it will be sufficient here to notice, that the case of Mackreth v. Symmons did in effect determine, that an equitable mortgagee by deposit of title deeds, had not such right to preference; for in that case, the plaintiff had a lien as *vendor*, the defendant was a subsequent *mortgagee*, to whom an actual conveyance had been made by the assignees of the vendee; the defendant had foreclosed, but without making the plaintiff a party to his bill. It proved that the legal estate was outstanding in a third person, so that all the incumbrances were equitable. Lord Eldon, after noticing that fact, observed, "then between equities the rule '*Qui prior est tempore potior est jure*,' applies;" and gave judgment for the plaintiff, thus making no difference between this and any other species of equitable mortgage. This

(*a*) Vide *ex parte* Knott, 11 Ves. jun. 618.

point was also discussed in Nairn v. Prowse (*a*), but did not in the latter case call for a decision.

Another matter of considerable importance (*b*), was alluded to in Mackreth v. Symmons, *viz.* whether the Court would, in the event of the death of the vendee, marshall the assets in favour of third persons, so as in case of necessity to throw the lien on the purchased estate. Mr. Sugden, with his usual ingenuity, has also given this matter his consideration (*c*), and states in rather strong terms, that a third person cannot require the purchased estate and the personal estate to be marshalled.

The general rule in equity is, that if a person has two funds to which he may resort, he shall not disappoint another person, who can only resort to one of the funds (*d*). If therefore Mr. Sugden's conception be correct, the present is *an exception* to this benevolent and wise rule of equity. It is necessary for us to inquire into the soundness of the distinction.

The principal authority for this exception to the general rule is the language used by Lord Hardwicke in giving judgment in the case of Pollexfen v. Moore (*e*), *viz.* that this equity did not apply to third

(*a*) *Supra.*
(*b*) Vide 1 P. Wms. 680, note.
(*c*) Vendors and Purchasers, p. 443, 4th Edit.
(*d*) Aldrich v. Cooper, 8 Ves. jun. 382.
(*e*) 3 Atk. 372.

persons, and that if a vendor should exhaust the personal assets of the vendee, a legatee under the will of the vendee would not be entitled to stand in his place. The circumstances in this case were : the vendee had died without paying all the purchase-money, and devised the estate to Kemp whom he made executor, and also (subject to some legacies) residuary legatee. Kemp wasted the personal assets and died leaving Boyle Kemp his heir at law. The vendor filed his bill for payment of the residue of the purchase-money, and one of the legatees under the vendee's will filed a cross bill, praying that if the purchase-money was paid out of the personal estate, she might stand in the vendor's place as to his lien on the land. Lord Hardwicke, after stating as before mentioned, that the equity did not apply to third persons, and that if the vendor should exhaust the personal assets of the vendee and of Kemp, the legatee would not be entitled to stand in his place and to come upon the purchased estate ; added, but he also thought the heir should not avail himself of his father's injustice, and therefore he would direct the vendor to take his satisfaction out of the purchased estate.

The decree in Pollexfen v. Moore is however considered to have been, and certainly was, at variance with the judgment ; for it ordered that the purchase-money and interest should in the first place be paid out of the *personal* estate of the vendee, but if it should appear that the vendee did not leave assets sufficient to pay the residue of the purchase-money and all his other debts, legacies, and funeral expenses;

or if the personal estate of the vendee was not sufficient by reason that the assets of Kemp were not sufficient to answer such part thereof as came to his hands, then such deficiency, so far as the personal estate of the vendee should be applied in payment of the purchase-money, should be made good out of the purchased estate; and a competent part thereof was to be sold accordingly.

This decree certainly went to marshalling the assets, but it seems that the vendor had not parted with the title deeds, which Mr. Sugden considers to have been the ground for the decree, on the principle that he had an equitable mortgage on the estate. With this explanation, Mr. Sugden thinks the case of Pollexfen v. Moore, establishes an important distinction, *viz.* that where the vendor has an equitable mortgage on the estate, or in the case of fraud, the purchased estate and the personal estate will be marshalled in favor of simple contract creditors and legatees.

The case of Coppin v. Coppin (*a*), is also considered an authority in support of this doctrine. In that case, it appeared that a younger brother had purchased an estate of his elder brother, and died before payment of all the purchase-money. By his will, he charged the estate with heavy legacies, but it was attested by two witnesses only; his brother was his heir at law, and also executor. Lord Chancellor King held, that the elder brother had an equi-

(*a*) Sel. Cha. Ca. 28. 2 P. Wms. 291.

table lien on the estate, which he was entitled to discharge out of the personal assets, and that the legatees under the will could not stand in his place with respect to the equitable lien.

It may be remarked, that this case was attended by peculiar circumstances, for the elder brother had a double right to retain the remaining purchase-money out of the personal assets, first as vendor and secondly as heir. It must however be admitted, that in principle, it appears a considerable authority in favor of the exception contended for by Mr. Sugden in this instance to the general rule of marshalling.

Mr. Sugden also urges, that it seems to have been thought in Coppin v. Coppin, and apparently, he says, with some reason, that extending the vendor's lien to third persons, would be breaking in upon the statute of frauds. And he argues thus; 'the general rule as to marshalling applies to cases, where the person resorting to the personal estate has an actual charge or lien on the real estate, but in this case, if equity first deems the purchaser a trustee for the vendor, as to so much of the estate as will satisfy the purchase-money unpaid, and then permits a disappointed legatee to stand in the place of the vendor, it is creating a charge on the land in direct opposition to the statute of frauds." Now it is submitted in reply to this reasoning, that the inroad on the statute of frauds would not in fact be greater in the case here put, than in the case of an equitable lien by possession of title deeds, on which ground Mr. Sugden attempts to reconcile the judgment and de-

cree in Pollexfen v. Moore. For in fact in the latter case, the mortgage is raised on the presumption of equity, and then the legatee is let in to stand in the mortgagee's place. The cases are nearly parallel or at all events are equally within the mischief intended to be prevented by the statute of frauds.

Notwithstanding the cases of Coppin v. Coppin and Pollexfen v. Moore, we find the distinction in question by no means approved by two of the most able judges who have sat in equity. For the late master of the rolls has declared he could not distinguish it from the common case of marshalling (*a*), and the present Lord Chancellor in an earlier case (*b*) shewed the inclination of his opinion to be in favor of the legatee, and in a recent case (*c*) he has expressed that opinion in very clear and forcible language. He first remarked "that the case of Coppin v. Coppin required a good deal of consideration. If the estate had been in a third person, the general doctrine as to a person having two funds to resort to might be thought to have an immediate application; and the express terms of the decree in Pollexfen v. Moore might be found very inconsistent with it. He afterwards observed that if the meaning of Lord Hardwicke's remarks in Pollexfen v. Moore, *viz.* that the equity

(*a*) Trimmer v. Baynes, 9 Ves. jun. 209.

(*b*) Austen v. Halsey, 6 Ves. jun. 475, *et vide* 2 P. Wms. 295. note.

(*c*) Mackreth v. Symmons, *supra*.

would not extend to a third person, was that he would follow the case of Coppin v. Coppin, and that if the vendor exhausted the personal assets, the legatee of the purchaser should not come upon the estate, there was great difficulty in applying the principle, as it would then be in the power of the vendor to administer the assets as he pleased; having a lien upon the real estate to exhaust the personal assets and disappoint all the creditors, who if he had resorted to his lien would have been satisfied; and in that respect, with reference to the principle, the case was anomalous." It may perhaps be now considered, that whenever the point shall call for decision the probability is that the general rule will prevail, and this species of equitable mortgage will not be distinguished from the rest in so important a point as that which we have been discussing.

It must be recollected that the doctrine of equitable lien does not apply to personal estate, for as soon as the vendee has possession, actual or constructive, the lien is gone (*a*), and after the delivery of part, there can be no stoppage *in transitu* of the remainder (*b*); but of this more will be said hereafter.

(*a*) See 15 Ves. jun. 344.
(*b*) *Ex parte* Gwynne, 12 Ves. jun. 383.

CHAPTER XIV.

Of Mortgages of Chattels personal.

It will be necessary to premise a few general observations on mortgages of chattels personal.

The 13 of Eliz. cap. 5. has enacted that "all and every feoffment, gift, grant, alienation, bargain, and conveyance of lands, tenements, hereditaments, goods, chattels, or of any of them, or of any lease, rent, common or other profit or charge out of the same lands, tenements, hereditaments, goods, and chattels, or any of them, by writing or otherwise; and all and every bond, suit, judgment, and execution, at any time had or made *to or for any intent or purpose to delay, hinder, or defraud creditors or others* of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, or reliefs, shall be deemed and taken (only as against such person or persons, his or their heirs, successors, executors, administrators, and assigns, and every of them, whose actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs, by such guileful, covinous, or fraudulent devises and practices as is aforesaid, are, shall, or might be in any ways disturbed, hindered, delayed, or defrauded) to be clearly and utterly void, frustrate, and of none effect." And a penalty is inflicted of one year's value of the lands, and the whole value of the goods, on parties

and privies to the transaction who shall defend the same, or alien or assign the lands or goods to him or them conveyed or assured, and imprisonment for one half year (*a*). But it is provided (*b*), that the act shall not extend to any estate or interest in lands, goods, or chattels, had, made, conveyed, or assured, which estate or interest shall be *upon good consideration and bonâ fide* lawfully conveyed or assured to any person or persons, *not having at the time of such conveyance or assurance any manner of notice or knowledge* of such covin, fraud, or collusion as aforesaid.

On this statute, Lord Ellenborough has remarked (*c*) it is not every feoffment, judgment, &c. which will have the effect of delaying or hindering creditors of their debts, &c., that is therefore fraudulent within the statute; for such is the effect *pro tanto* of every assignment that can be made by one who has creditors. Every assignment of a man's property, however honest and good the consideration, must diminish the fund out of which satisfaction is to be made to his creditors. But the feoffment, judgment, &c. must be devised of malice, fraud, and the like, to bring it within the statute.

The retention of the possession by the debtor of

(*a*) 3d Sec. *Nota.* Although in the latter part of this section, the word '*bond*' only is used, yet it must be taken to extend to feoffments, judgments, &c., as mentioned in the other parts of the clause 4 East, 15.

(*b*) 6th Sec.

(*c*) Meux *qui tam* v. Howell, 4 East. 13.

chattels personal, after assignment, is however *primâ facie* proof of fraud. This was decided by Twyne's case (*a*), heard in the 44th year of the reign of Queen Elizabeth. The circumstances were; Pierce was indebted to Twyne in 400*l.* and to C. in 200*l.* C. brought action of debt; and pending the action, Pierce, who was possessed of goods and chattels of the value of 300*l.* made a general assignment to Twyne, *but continued in possession*, and used them as his proper goods. C. obtained judgment, and had a *fi. fa.*; on which the sheriff proceeded to levy and was resisted by Twyne and others. And it was resolved that the gift had signs and marks of fraud, and that there was an implied trust between the parties, and that although there was a good consideration for the assignment, yet it was not *bonâ fide* within the meaning of the proviso, but the deed was fraudulent and void. Lord Coke in his report of this case adds, "And therefore, reader, when any gift shall be to you in satisfaction of a debt by one who is indebted to others also; let it be made in a public manner and before the neighbours and not in private, for secrecy is a mark of fraud. 2. Let the goods and chattels be appraised by good people to the very value, and take a gift in particular in satisfaction of your debt. 3. Immediately after the gift, take the possession of them, for continuance of the possession in the donor is a sign of trust and that which is between the donor and donee called a trust *per nomen speciosum*, is in truth as to all the creditors a fraud, for

(*a*) Twyne's case, 3 Rep. 80.

they are hereby defeated and defrauded of their true and just debts (*a*)."

But although possession of goods and chattels after sale or mortgage is *primâ facie* a mark of fraud, within the statute of the 13 Eliz. yet it is but presumptive evidence, which may be rebutted by evidence written or as it seems parol (*b*) on the part of the vendee or mortgagee shewing the possession was consistent with the nature of the transaction.

As first, if actual delivery be from circumstances impossible, *lex neminem cogit ad impossibilia*, as in the case of an assignment of a ship at sea (*c*), or in a foreign port (*d*), or of goods at sea (*e*), or goods in transitu (*f*), when the delivery of the muniments of title, attended as to ships with such formalities as the statute law requires, will be sufficient, of which more hereafter; and also in the case of choses in action, as bond debts in which an assignment of the debt and delivery of the bond will be also sufficient (*g*).

Secondly, where actual delivery has been made as nearly as may be, such as where goods are bulky

(*a*) *Et vide* Bamford v. Baron, 2 Term Rep. 594, note.
(*b*) Cole v. Davis, 1 L. Raym. 724. Meggott v. Mills, *ibid.* 286.
(*c*) Atkinson v. Mayling, 2 Term Rep. 462.
(*d*) *Ex parte* Batson, 3 B. C. C. 362.
(*e*) Brown v. Heathcote, 1 Atk. 160, *et vide* 1 Ves. 362.
(*f*) Flyn v. Mathews, 1 Atk. 185.
(*g*) 1 Ves. 367.

and are in a warehouse and the key of the warehouse is delivered (*a*).

Thirdly, where delivery is refused notwithstanding the agreement to the contrary (*b*).

Fourthly, where the possession is consistent with the deed of assignment (*c*), as in the case of goods *bonâ fide* settled on marriage, or in the cases presumed by Mr. Powell (*d*), *viz.* of an assignment to a creditor without his privity, or an assignment to secure a future contingent debt, or under apprehension of legal process; or where from the very nature of the transaction a delivery could not be contemplated, such as (*e*) where a supercargo of a ship bound to the East Indies, having shipped goods, and made a bill of sale of them and of their profits to one Royston by way of mortgage. The voyage was made and the supercargo sold the goods, and bought others, and made several barters and exchanges. He afterwards died at sea, and in a question between the mortgagee and a judgment creditor, the Lord Chancellor held the assignment valid, for though sold to Royston they were entrusted to the supercargo to negotiate and sell them for Royston's advantage, and the possession was not for the purpose of giving a false credit.

(*a*) West v. Skip, 1 Ves. 244. *Ibid.* 362. Smith v. Smith, Stra. 955.

(*b*) 1 Ves. 244.

(*c*) Cadogan v. Kennett, Cowp. 432. Haslington v. Gill, cited in 2 Term Rep. 597.

(*d*) Powell on Mortgages, 4th Edit. 50, 51.

(*e*) Bucknel v. Royston, Pre. Cha. 289.

And lastly, it has been held that if the assignment be on a *condition* to be performed by the vendee, the vendor's continuance in possession does not avoid it, because by the terms of the conveyance, the vendee is not to have possession until he has performed the condition (*a*).

In the 21st year of King James the First (*b*), a further enactment was made for the benefit of creditors, which applies to cases of bankruptcy, but is much more powerful in its effects than the preceding statute of Elizabeth, inasmuch as the saving clause for the protection of sales and mortgages made for a valuable consideration and *boná fide* is not inserted. By that statute, after reciting that it often falls out that many persons before they become bankrupts, do convey their goods to other men upon good consideration, yet still keep the same, and are reputed the owners thereof, and dispose of the same as their own, it is enacted, that "if any person or persons shall become bankrupt, and at such time as they shall so become bankrupt shall by the consent and permission of the *true owner and proprietary* have in their *possession, order, or disposition*, any goods or chattels *whereof they shall be reputed owners* and take upon them the sale, alteration, or disposition as owners, that in every such case the commissioners or the greater part of them shall have power to sell and dispose the same to and for the benefit of

(*a*) Edwards v. Harben, 2 Term Rep. 596.

(*b*) 21 Jac. 1. cap. 19. sections 10 and 11. *Et nota*, the recital to the eleventh section is, by the misprinting of the statute, added to the tenth section.

the creditors which shall seek relief by the said commission as fully as any other part of the estate of the bankrupt."

Several important questions were entertained as to the operation of this statute. It was questioned whether the generality of the enacting clause was not restrained by the recital to goods which were *originally* the bankrupt's (*a*). But it was determined unanimously by the judges of the King's Bench (*b*), that the statute extended to the goods of *third persons* in the trader's possession *to sell as his own*, but not to goods confided to him as a mere factor or goldsmith. Another question was, whether *conditional sales* were within its purview, the words of the statute being, if any person, &c. shall become bankrupt, and at such time as he shall so become bankrupt shall by consent of the *true owner* have possession, &c. It was contended a mortgagee was not the true owner; but it was adjudged that the words, *true owner*, were put in contradiction to false or seeming owner, and therefore mortgages were within the act (*c*). Another point debated was, whether the words *goods and chattels* in the act comprehended *choses in action;* and it was held they did (*d*). And

(*a*) *Vide* L'Apostre v. L'Plaisterer, cited 1 P. Wms. 318, *et vide* 3 P. Wms. 185. 1 Ves. 365, 371.

(*b*) Mace v. Cadell, Cowp. 232, *et vide* Copeman v. Gallant, 1 P. Wms. 314. Horn v. Baker, 9 East, 215.

(*c*) Ryal v. Rowles, 1 Ves. 349. 1 Atk. 165.

(*d*) Ryal v. Rowles, *supra*. Jones v. Gibbons, 9 Ves. jun. 410. *Ex-parte* Ruffin, 6 Ves. jun. 182; *et vide ex-parte* Kensington, 2 V. and B. 79, which decided, that a trust estate *in stock* was not

therefore in order to divest from the mortgagor the ownership of outstanding debts, he must have done every thing that is equivalent to a delivery of chattels personal, *i. e.* of moveable goods, *viz.* assignment, delivery of the security, and notice to the debtor (*a*), but debts due *on mortgage* are not within the statute, although collaterally secured by covenant or bond (*b*).

In the case of Ryal v. Rowles (*c*) it was held, that if a moiety of stock in trade be mortgaged by one partner to another, and they both continue the apparent owners, this is not a sufficient possession to give a specific lien against general creditors; and that if an undivided share of stock in trade be assigned to a stranger, it is necessary the mortgagee should be admitted into the business to render the security valid.

The effect of these statutes is, that although a mortgage of chattels personal made *bonâ fide* and for a valuable consideration, but the possession of which is retained by the assignor, will be valid against creditors, under the 13 of Eliz., if it can be shewn the possession is consistent with the nature of the transac-

within the statute, and passed by mere assignment, not being capable of actual delivery.

(*a*) Jones v. Gibbons, *supra.* (*b*) *Ibid.*

(*c*) *Supra, sed nota,* that partners are seised *per my et per tout,* and each must be allowed against the other every thing he has advanced or brought in *as a partnership transaction,* and to charge the other in the amount with what that other has not brought in or has taken out more than he ought, and nothing is to be considered as his share but his proportion of the residue on the balance of accounts. West v. Skip. 1 Ves. 242.

tion, so that the presumption of fraud raised by the possession is rebutted; yet it may be void under the statute of James, as against the assignees of a bankrupt trader, who continues the *reputed owner* (*a*), unless it can be shewn that possession has been given as far as circumstances would permit, and therefore although in the before mentioned cases of Cadogan v. Kennett and Bucknel v. Royston the assignments were valid within the 13 of Eliz., yet they would, it is conceived, have been void within the 21st of Jac. 1 (*b*). But in the before mentioned cases of the delivery of the key of the warehouse, the delivery of the muniments of ships or goods at sea, and of the bond on assignment of a bond debt, the assignments would have been valid under both statutes. The possession of goods by a *factor*, is not within the statute of James (*c*), nor is the possession by the debtor after assignment of chattels real (*d*), nor of fixtures annexed to the freehold (*e*); but the possession after assignment of fixtures severed from the freehold, is within the statute (*f*).

(*a*) As to what will amount to a reputed ownership, see the several cases of Walker v. Burnell, Dougl. 317. Bryson v. Wylie, cited in note, 1 Bos. and Pull. 83. Gordon v. The East India Company, 7 Term Rep. 228. Lingham v. Biggs, 1 Bos. and Pull. 82. Collins v. Forbes, 3 Term Rep. 316. Darby v. Smith, 8 Term Rep. 82. Horn v. Baker, *supra*.

(*b*) *Vide* Pre. Cha. 288.

(*c*) Ryal v. Rowles, *supra*.

(*d*) *Ibid, et vide* Co. Bank. Law, 6th Edit. 339. Jones v. Gibbons, *supra*. Stephens v. Stephens, 1 Ves. 352. Bourn v. Dodson, 1 Atk. 154.

(*e*) Ryal v. Rowles, *supra*. *Ex parte* Quincy, 1 Atk. 474. Horn v. Baker, *supra*.

(*f*) Ryal v. Rowles, *supra*. Horn v. Baker, *supra*.

It must also be borne in mind on a treaty for a mortgage of chattels personal, that although a *factor* may make a *bonâ fide sale* of the goods entrusted to his charge, yet he cannot *pledge* them; or at least if he does, the mortgagee will hold subject to the like claims as when the goods were in the factor's possession, although the mortgage was made without notice of the fact (*a*).

(*a*) Paterson v. Tash, 2 Str. 1178. Daubigny v. Duval, 5 T. R. 604. Newsome v. Thornton and another, 6 East, 17. De Bouchout v. Goldsmid, 5 Ves. jun. 211.

CHAPTER XV.

Of Mortgages of Bills of Lading.

Bills of lading may become subjects of pledge; and by indorsement thereon by the consignee, the legal right of ownership may be transferred to an assignee, so as to divest or preclude the right of the consignor to arrest the goods in *transitu*. The latter point has given rise to a considerable difference of judicial opinion but seems now at rest. In Evans v. Martlett (*a*), Holt, Chief Justice, laid down the law generally that the consignee of a bill of lading has such a property that he may assign it over, and Shower said it had been adjudged so in the Exchequer; and it would seem by the case of Lempriere v. Pasley (*b*) that as between the consignee and assignee it is immaterial whether there be an assignment or only an agreement to assign. In Wright v. Campbell (*c*) the law as laid down in Evans v. Martlett was fully recognized. In Snee v. Prescott (*d*) which was heard before Lord Chancellor Hardwicke, and which is the authority for the doctrine of the consignor being empowered to stop the goods in *transitu* before they are delivered to

(*a*) Evans v. Martlett, 1 Lord Raymond, 271. 3 Salk. 290.

(*b*) Lempriere v. Pasley, 2 T. R. 485.

(*c*) Wright v. Campbell, 4 Burr. 2047.

(*d*) Snee v. Prescott, 1 Atk. 245.

the consignee, a doctrine prevailed different to that in Evans v. Martlett and Wright v. Campbell. In that case, Ragueneau and Co. had purchased silks at Leghorn for Tollett, and sent Tollett the bills of lading which were indorsed *in blank*. Tollett assigned the bills of lading to Julian and Co. as a security for a debt, and assigned the invoices of part of the goods to Thomas for a like purpose; Tollett had paid Ragueneau and Co. about half the price of the goods and became bankrupt. Prescott who was a partner in the house of Ragueneau and Co., and who lived in London, wrote to his partners at Leghorn informing them of Tollett's bankruptcy, and requesting them to send to him the bills of lading which remained in their possession which they did together with an order to the captain to deliver the goods to Prescott who received them. The assignees by their bill prayed the goods might be sold and the produce applied in satisfaction of the debts of Julian and Co. and Thomas, and the residue paid to them; and that Ragueneau and Co. might come in as creditors under the commission. The Lord Chancellor thought it a harsh demand, and seemed to consider an indorsement in blank to be rather in the nature of an authority than any thing more, and that the weight of evidence upon the custom of merchants, whether in the case of such an indorsement and before delivery it was not in the consignor's power to countermand the authority was in favor of the defendants, and he accordingly ordered, that the produce of the silks should be first applied in satisfaction of the debt of Ragueneau and Co., and afterwards of the specific

liens. In Lickbarrow v. Mason and others (*a*) which was heard in November, 1787, the principles on which the case of Snee v. Prescott was decided were overruled; and the Court held, that although as between the consignor and consignee, the actual ownership was not altered until delivery of the goods so that the consignor might stop them in *transitu*, yet that as between the consignor and an assignee of the consignee for valuable consideration and without fraud, the right of the consignor to stop the goods in *transitu* was by the assignment divested, notwithstanding the indorsement by the consignor was in blank (*b*). From this decision there was an appeal by writ of error in the Exchequer, and the judgment in the Court of King's Bench was reversed (*c*). The case was then carried to the House of Lords who, in Trinity Term 1793, awarded a *venire facias de novo* (*d*). The case was accordingly again tried (*e*) and a special verdict returned, which, after stating the facts of the case, found "that by the custom of merchants, bills of lading expressing goods or merchandizes to have been shipped by any person or persons to be delivered to order or assigns, have been and are at any time after such goods have been shipped and before the voyage performed, for which they have been or are shipped,

(*a*) Lickbarrow v. Mason and others, 2 Term Rep. 63.

(*b*) *Ibid, et vide* Fearon v. Bowers, and Assignees of Burghall v. Howard, 1 H. Blac. 364, note.

(*c*) 1 H. Blac. 357.

(*d*) 2 H. Blac. 211.

(*e*) 5 Term Rep. 683.

negotiable and transferrable by the shipper or shippers of such goods, to any other person or persons by such shipper or shippers indorsing such bills of lading with his, her, or their name or names, delivering or transmitting the same so indorsed, or causing the same to be so delivered or transmitted to such other person or persons, and that, by such indorsement and delivery or transmission, the property in such goods hath been and is transferred and passed to such other person or persons; and that by the custom of merchants, indorsements of bills of lading in blank, that is to say, by the shipper or shippers with their names only have been and are and may be filled up by the person or persons to whom they are so delivered or transmitted as aforesaid, with words ordering the delivery of the goods or contents of such bills of lading to be made to such person or persons, and, according to the practice of merchants, the same when filled up have the same operation and effect, as if the same had been made or done by such shipper or shippers, where he, she, or they indorsed the said bills of lading with their names as aforesaid." The Court understanding it was intended the case should be carried up to the House of Lords, declined entering into a discussion of it; and merely said, that they still retained the opinion delivered upon the former case, and they accordingly gave judgment for the plaintiff. In this judgment the parties seem to have acquiesced, and the question appears to be considered as decided, that a bill of lading indorsed in blank by the consignor, and delivered by him to *a vendee*, will, by assignment to a purchaser, or mortgagee, divest from the consignor his right of stoppage in *transitu*; but this doctrine

must be understood with the qualification, that the assignee has not directly or indirectly notice that the goods are not paid for by the vendee, or is not otherwise affected by fraud (*a*); and a distinction has been taken in the case of a consignment to *a factor*, for, upon the principle already laid down, namely, that although a factor may sell, yet he cannot pledge or pawn goods in his possession (*b*) it has been holden that *a factor* cannot *pledge* the goods of the consignor by an assignment of the bill of lading, even although the indorsee has not notice of the fact of the indorser being a factor only (*c*); but it is also clear, that the factor may assign the bill of lading by indorsement for the purpose of absolute sale (*d*).

A few general observations remain to be made on this head:

First, it must be noticed that where there are several bills of lading, the captain of the ship will be justified in delivering the goods on the production of any one of them, but that in point of ownership, the goods will, without reference to the respective times of the captain of the ship signing the bills of lading, be the property of him who first obtains possession of one of the bills by a legal title (*e*).

(*a*) Salomons v. Nissen and Another, 2 T. R. 674. and Savignac v. Cuff, ibid. 678, cited.

(*b*) *Vide supra* page 267, and the cases there cited.

(*c*) Newsome v. Thornton, 6 East, 17.

(*d*) Wright v. Campbell, 4 Burr. 2046, 2050.

(*e*) Caldwell v. Ball, 1 T. R. 205.

Secondly, that it is not necessary, in order to divest the consignor's right to stop the goods in *transitu*, that they should be delivered into the hands of the consignee himself; it is sufficient if a mark is put on them on his behalf although they are not actually removed (*a*).

Thirdly, it does not seem to be actually decided how far a mere agreement to assign a bill of lading would be binding in equity on the consignor although clearly binding on the consignee, and those claiming under him (*b*). But it is probable it would be considered inoperative unless actual possession was first obtained by the equitable assignee which might be considered the obtaining possession by the consignee.

And lastly, it may be remarked that if the consignee execute an equitable assignment of goods while at sea, and afterwards commit an act of bankruptcy (*c*), and after the act of bankruptcy indorse the bills of lading to the assignee, the assignment will even at law be valid against the assignees under the commission.

(*a*) Ellis v. Hunt, 3 Term Rep. 464.

(*b*) Brown v. Heathcote, 1 Atk. 162. Lempriere v. Pasley, *supra*.

(*c*) Lempriere v. Pasley, *supra*.

CHAPTER XVI.

Mortgages of Ships and Freight.

THERE is no species of mortgage security requiring greater circumspection than that we are about to consider. In almost every other instance of the transfer of property, a defect in the assurance is remediable in equity on proof of the equitable contract between the parties as already noticed. But so strict are the provisions of the statute law regulating the change of this nature of property as almost to oust the jurisdiction of equity.

By the 7th and 8th William III. cap. 22 (*a*) it is enacted, that no ship or vessel shall be deemed a British built vessel qualified to trade to or from *the plantations* until registered on the oath of one or more of the owners before the collector or comptroller of the port to which the ship or vessel shall belong, which oath being attested by the officers shall be delivered to the master, and a duplicate of the register transmitted to the commissioners of the customs in London, and that no ship's name should be changed without registering such ship *de novo*, [which was thereby required to be done upon any transfer of property to another port,] and delivering up the former certificate to be cancelled; and that in case

(*a*) 7 and 8 Wm. 3. cap. 22.

there should be any alteration of property in the same port by the sale of one or more shares in any ship after registering thereof, such sale should always be acknowledged by indorsement on the certificate of the register before two witnesses, in order to prove that the entire property in such ship remained in some of the subjects in England.

This act it was considered did not preclude a mere parol agreement or contract for sale; and it applied only to ships trading to and from *the plantations.*

By the act of the 26 Geo. 3. cap. 60 (*a*), the provisions of the 7th and 8th William III. cap. 21. are extended to *all* British built ships of 15 tons or upwards; a form of certificate of registry is prescribed which is to be delivered to the owner; and it is provided that no registry shall be made except at the port to which the ship belongs. A new form of oath is prescribed, and it is provided, that besides the indorsement required by the act of the 7th and 8th Wm. III. cap. 21. on the alteration of property in such ship or vessel, there shall be indorsed on the certificate of registry before two witnesses, the town, place, or parish where the transferees reside, and they shall deliver a copy of the indorsement to the persons authorized to make registry, who shall indorse the same on the affidavit upon which the original certificate was granted, and enter the same in the

(*a*) 26 Geo. 3. cap. 60.

book of registers and forthwith give notice thereof to the commissioners. The 17 sec. then enacts "that when and so often as the property in any ship or vessel shall be transferred in whole or in part, *the certificate of the registry of such ship or vessel shall be truly and accurately recited in words at length in the bill or other instrument of sale thereof*, and that otherwise, such bill of sale shall be utterly *null and void* to all intents and purposes." The 32 sec. declares "that every ship shall be forfeited which shall proceed to sea without having obtained the certificate;" and by the 34 sec. a penalty of 100*l.* is imposed on the master who shall not on demand produce the certificate for the inspection of the principal officer or British consul at any port at home or abroad.

A case (*a*) occurred soon after the passing of this statute in which it became necessary to consider the effect of its provisions, both at law and in equity. Margetson executed on the 21 June 1788 a bill of sale of the ship Commerce to Hibbert and others, and deposited with them the grand bill of sale, but the assignment did not contain a recital of the certificate. Hibbert and Co. gave Margetson an acknowledgment in writing, promising to return the grand bill of sale on payment of certain sums then due; the ship was at sea, and before her arrival in port Margetson became bankrupt; the assignees afterwards brought trover for the ship; it was contended by the

(*a*) Rolleston and others, assignees of Margetson a bankrupt, v. Hibbert and others, 3 Term Rep. 406.

defendants, that the transfer of ships at sea was not within the Act, because it was necessary the certificate should be on board the ship, and therefore could not be recited, or that, at all events, the defendants had a lien on the ship for the money due. The Court held the case to be within the statute; for the parties might have extracted from the registry at the custom-house all that was necessary for the recital; and that it was a pledge and not a lien, and the bill of sale was absolutely void. On this (*a*) the defendants at law filed their bill in equity against the assignees for relief, on the ground that the bill of sale was a defective assurance, which ought to be made good by the assignees within the principle of the cases of Burgh v. Frances (*b*), and Taylor v. Wheeler (*c*). On the other hand it was contended, that the Court could not give relief against the Act of Parliament, and that the case resembled the void grant of an annuity, for which, it was never thought there was remedy in equity, although the grantee might recover back the consideration-money. Lord Chancellor Thurlow, after expressing great doubts, dismissed the bill without costs.

The same assignees (*d*) afterwards brought trover for the recovery of another ship assigned by Margetson, which ship was also at sea, but in this case, application had been made at the register-general's office in the custom-house for a copy of the

(*a*) Hibbert and others v. Rolleston and others, 3 B. C. C. 671.
(*b*) *Supra*, page 223. (*c*) *Supra*, page 223.
(*d*) Rolleston and others v. Smith, 4 Term Rep. 161.

certificate, which was recited in the bill of sale, but it turned out, there was a clerical error in the custom-house copy, and the signatures of the officers were not mentioned in the recital. The Court held that the clerical error did not vitiate the bargain and sale, and that mention of the signatures was not necessary.

A very strong case (*a*), was afterwards heard in the King's Bench on an action upon a policy of insurance on freight. The ship had been paid for by four partners but was registered in the names of two only; the action was brought in the names of three; the declaration consisted of two counts: the first averred the interest to be in the three plaintiffs; the second averred the interest to be in them and the fourth partner. It was argued for the plaintiffs, that the two partners in whose name the register was made, might by parol agreement transfer their right to the other two in conjunction with themselves. Lord Kenyon intimated a strong opinion, that no title could be made to a ship, except by a bill of sale in writing pursuant to the Act. The Court decided, that the right to the freight resulted from the ownership, and that the plaintiffs had neither a legal or equitable interest in the ship, and the plaintiffs were nonsuited.

Shortly after the determination of the case of Camden v. Anderson, and to remove the doubt,

(*a*) Camden v. Anderson, 5 T. R. 709.

whether the interest in a ship could be transferred by parol, the Act of the 34 Geo. III. cap. 68. (*a*), enacted, that no *transfer, contract or agreement* of property, in any ship or vessel, should be valid or effectual for any purpose whatsoever, either at law or in equity, unless by bill of sale or instrument in writing, containing such recital as prescribed by the Act; and it enacted that the indorsement upon the certificate of register should be made in the manner and form therein mentioned, and signed by the party making the transfer, and a copy of it delivered to the person authorized to make registry, otherwise such *sale or contract or agreement* should be utterly null and void; and the officer is required to indorse the same on the affidavit, and enter it in the book of registers, and transmit notice of it to the commissioners. The 16th section then provides, that if any ship or vessel shall be at sea, or absent from the port to which she belongs at the time when such alteration in the property thereof shall be made as aforesaid so that an indorsement or certificate cannot be immediately made, the sale or contract or agreement for the sale thereof shall notwithstanding be made by a bill of sale or other instrument in writing as before directed, and a copy of such bill of sale or other instrument in writing shall be delivered and an entry thereof shall be indorsed on the oath or affidavit, and a memorandum thereof shall be made in the book of registers, and notice of the same shall be given to the commissioners of the customs in the

(*a*) 34 Geo. III. cap. 68. sec. 14.

manner thereinbefore directed, and *within ten days* after such ship or vessel shall return to the port to which she belongs, an indorsement shall be made and signed by the owner or owners or some person legally authorized for that purpose by him her or them, and a copy thereof shall be delivered in manner thereinbefore mentioned, otherwise such bill of sale, or contract or agreement for sale thereof, shall be utterly null and void to all intents and purposes whatsoever; and entry thereof shall be indorsed, and a memorandum thereof made in the manner thereinbefore directed. The 21st section provides for the granting of registers *de novo* on the alteration of property in the ship or vessel without change of port at the request of the owners or proprietors.

On these statutes there have been many most important decisions both at law and in equity. It will be sufficient for us to give our attention to those which more especially apply to the subject of the present treatise. We shall however find it necessary in some few instances, to consider cases having a more general bearing on the subject of the registration and assignment of shipping. The decisions principally turn on the assignment of vessels *while at sea.*

In the case of Moss v. Charnock (*a*), two-thirds of a vessel were in August, 1800, assigned by way of security. In November, the assignor became bank-

(*a*) Moss v. Charnock, 2 East, 399.

rupt. None of the requisites of the Acts of the 26 and 34 Geo. 3. were complied with until December following, when all was done which could be then performed. On the 7th March the ship came into port, and within ten days, the remainder of the requisites of the Acts were performed. The assignees of the bankrupt brought trover, and contended, that the bankruptcy having intervened between the time of the execution of the bill of sale and the compliance with the requisites of the Acts, no property passed from the bankrupt prior to his bankruptcy; on the other hand, it was contended, that as the requisites of the statute of the 34 Geo. 3. were complied with within a *reasonable* time after the assignment, that would by relation make the sale complete; the Court held that the public would be most effectually served by holding that no interest should pass from any owner of British ships to any other until the public had that information which was so essential to its commercial welfare which would be best done by construing the statute as enacting, that no bill of sale or other such instrument should have *any operation or effect*, until the requisites imposed on the parties by the sale were complied with, and by not allowing any relation to hold good, so as to make the conveyance effectual from any antecedent time; and the Court was not aware of any authority to shew, that if a statute directs a certain thing to be done without limiting a time for doing it, that such statute was to be construed as if it had said that it should be sufficient, if the thing was done within a *reasonable* time, instead of understanding the statute as enacting that the instrument should have

no operation or effect, until what the statute required should have been complied with. Verdict was therefore given for the plaintiffs.

Lord Eldon has justly stated that the generality of the reasoning in Moss v. Charnock, went to this extent, viz. that if a man sold a ship at sea, the vendee having done every thing required by the act that could be done, but afterwards before the arrival of the ship in port an act of bankruptcy was committed by the vendor, the assignees under the commission of the bankruptcy and not the vendee would take the ship. In this his lordship said he could not concur (*a*).

Baron Wood also in delivering his opinion in the Exchequer Chamber in case of Hubbard v. Johnstone(*b*) expressed his disapprobation of the principle laid down in Moss v. Charnock, and said he thought the property passed instantly by the bill of sale, and that the subsequent acts to be done were not necessary to *transfer the property;* but the grant was *defeasible* by subsequent omissions, in cases where it was expressly provided but not otherwise; or in other words that the property vested in the vendee *instanter* on the execution of the bill of sale supposing it to contain a proper recital of the certificate, subject to be divested on non-performance of the subsequent acts required by the statute.

(*a*) Mestaer v. Gillespie, 11 Ves. jun. 637.
(*b*) 3 Taunt. 206.

In a recent case (*a*) the question arose on the effect of a writ of *fi. fa.* sued out by a creditor after the execution of the bill of sale and a memorandum of the transfer on the certificate of registry, but previously to a copy of the indorsement being delivered to the proper office, which however was done the next day. The Court held that the case of Moss v. Charnock was under the circumstances rightly decided, because there was gross delay, and the requisites of the statute were not complied with in a reasonable time, but they agreed in Baron Wood's construction of the statute, *viz.* that the bill of sale vested the property in the vendee, and that the requisites of the statute were in the nature of conditions subsequent, and as they were complied with as nearly *instanter* as could be and within a reasonable time, the writ of *fi. fa.* came too late.

Of this decision Lord Eldon has expressed his approbation (*b*), and decided that the bankruptcy of the vendor did not vitiate the bill of sale, the indorsement being made on the certificate within ten days after the ship's return as required by the Act, and that a power of attorney given by the vendee to make the indorsement was not revoked by the bankruptcy. On the same principle Sir Thomas Plomer, vice-chancellor, granted an injunction to prevent an improper indorsement being put on the certificate (*c*). The

(*a*) Palmer v. Moxon, 2 M. and S. 43.
(*b*) Dixon v. Ewart, 3 Mer. 322.
(*c*) Thompson v. Smith, 1 Madd. 395.

point may therefore be now considered settled, *viz.* that a bill of sale of a ship containing a proper recital of the certificate will vest the property in the vendee subject to its being divested on a failure of the performance of the requisites of the statutes (*a*).

It may be next necessary to consider, first, what is a proper recital of the certificate, and secondly, what will be on the part of the vendee, a sufficient compliance with the regulations of the statute law.

First then, it is safest to recite the certificate *in hæc verba*, for a material variation will totally vitiate the instrument (*b*). But we have seen that in one instance a mere clerical error was held not to annul it; in that case however the certificate was in effect the same as the recital, and the error was apparent in the bill of sale.

An agreement for a sale must also recite the certificate or it will not be available in equity (*c*).

Neither the bill of sale nor an agreement for a sale need however recite the indorsements on the certificate (*d*).

And secondly, as to what will be on the part of the

(*a*) *Sed vide* Ritchie v. St. Barbe, 4 Taunt. 768.

(*b*) For an instance of this see Westerdell v. Dale, 7 T. R. 306.

(*c*) Brewster and others v. Clarke and others, 2 Mer. 75, and see 34 Geo. 3. c. 68. s. 14.

(*d*) Capadose v. Codner, 1 B. and P. 483.

vendee a sufficient compliance with the requisites of the statute.

If the ship is in port, an indorsement must be forthwith made on the certificate of registry, and a copy of the indorsement, as nearly *instanter* as may be, transmitted to the proper officer of the customs.

If the ship is at sea, a copy of the bill of sale or other instrument in writing must be sent as soon as can be to the proper officer, and within ten days after the ship arrives in port the indorsement must be made on the certificate, and a copy of the indorsement delivered to the proper officer. The subsequent omissions of the officer of the customs will not affect the sale.

Although the bill of sale is null and void as an instrument of assignment, yet it is not nullified *to all intents;* and therefore a mortgagee may maintain an action of covenant against the mortgagor for the money lent under a covenant contained in the deed (*a*).

It is decided there can be no *equitable title* in a ship arising by implication of equity on acts between the parties, and that the register is conclusive evidence of the property even between joint and separate creditors, and that parol evidence is not admissible in equity to shew the money was advanced out of the joint concern (*b*). But a distinction must be made

(*a*) Kerrison v. Cole, 8 East, 231.

(*b*) *Ex parte* Yallop, 15 Ves. jun. 60. *Ex parte* Houghton, 17 Ves. jun. 251, *et vide* Curtis v. Perry, 6 Ves. jun. 739.

in the case of trusts arising by acts of law; as trusts vested in assignees on bankruptcy and in executors (*a*). And a much greater distinction must be made in the case of mortgages and of equitable contracts and agreements *registered within the statutes*.

It is also clear that in case the assurance is defective, relief will not be had in equity on the contract as in the case of other defective assurances, but that the transfer is *void* to all intents and purposes (*b*).

Whether equity will relieve in case of *fraud* on the part of the vendor preventing a compliance with the requisites of the statutes has been much doubted (*c*). In two recent cases (*d*), the master of the rolls refused to relieve on the ground of fraud, but the Lord Chancellor is said in a yet more recent case to have continued to express a doubt (*e*).

A declaration of trust will not however it seems vitiate the legal effect of the bill of sale if the requisites of the statutes are complied with (*f*).

In Thompson v. Smith (*g*), a doubt was started whether since the registry acts there could be a valid mortgage of a ship, or whether the right of redemption did not rest in honor between the par-

(*a*) *Ex parte* Houghton, *supra*.
(*b*) Speldt v. Lechmere, 13 Ves. jun. 589.
(*c*) Mestaer v. Gillespie, *supra*.
(*d*) See cases in note, 1 Madd. 400.
(*e*) *Vide* Madd. 406.
(*f*) Heath v. Hubbard, 4 East, 110.
(*g*) 1 Madd. 395.

ties. The circumstances were that one Llewellyn assigned one third of a ship to Smith by way of mortgage, and afterwards assigned the same third to Thompson by way of mortgage. Smith re-assigned to Llewellyn, who afterwards became bankrupt; and the ship being at sea, Thompson filed his bill for an injunction to prevent an improper indorsement on the certificate. The plaintiff contended there was no case deciding that an equity of redemption in a ship might not be assigned. For the defendants, it was urged, that since the registry acts, there was no such thing as an equitable title to a ship, and that there could be no such thing as an equity of redemption in a ship. The vice-chancellor said, "that the utmost effect of the cases then decided on the subject had been, that where the question was, whether the forms prescribed by the registry acts should prevail, or the equitable title be made good, the forms must prevail, but in the principal case, the forms had been observed by the plaintiff in letter and spirit; that a mortgage of a ship (independent of the statute) was like a mortgage of any other chattel, and that all the forms having been complied with, what was there in the registry acts to deprive the plaintiffs of their manifest equity? He was struck by the assertion that since the registry acts, there could be no valid mortgage of a ship, and that such mortgages were merely made upon honour; that ever since the passing of the 7th and 8th Wm. and the more recent statutes, it appeared from many cases both at law and in equity, that a ship might be mortgaged, and no doubt had ever been suggested on the subject. It was urged that the form of entry at the custom-house was incompatible with a mortgage, and that the acts had

thus indirectly put an end to mortgages. But he asked if all equitable titles in ships were put an end to, what was the meaning of the words "contract and agreement" in the 34 Geo. 3.? And therefore to say there could be no equitable title to a ship was to contradict the very words of the Act. It was correct to say, there could not be an equitable interest in a ship not notified at the custom-house, because if there might be an absolute bill of sale registered and a separate deed of defeasance not registered, the Act would be baffled, and foreigners might be secretly possessed of the ownership of the ship." His Honour then continued as follows: "Thinking this question to be of extreme importance, I have taken some pains to collect all the knowledge I could on the subject. I have seen the officers engaged in this department at the custom-house, and certainly there seems to have prevailed a very strong notion there, as well as in the profession, that some difficulties occur in consequence of the prescribed form of indorsement in the 34 Geo. 3. c. 68. s. 15. which is in the following terms:

"Form of Indorsement on change of property.

"Be it remembered that [*I or we*] [*names, residences, and occupations of the persons selling*] have this day sold and transferred all [*my or our*] right, share, or interest in or to the ship or vessel [*name of the ship or vessel*] mentioned in the within certificate of registry, unto [*names, residence, and occupation of the purchasers*]. Witness [*my or our hands*] this [*date in words at length*].

"Signed in the presence of

"[*Two witnesses*]."

" This form is adapted only to a total and absolute sale, and will not apply to a transfer by mortgage, the mortgagor not being properly within the term " seller," nor can he truly declare that he has sold " all his right, share, or interest in and to the ship or vessel," nor is the mortgagee properly a purchaser. At the custom-house the officers will not permit any entry but according to this prescribed form; the statute not having provided for a deviation from it in any case, nor allowing any sale to be valid without a strict observance of it.

" The consequence has been that where a ship is mortgaged, the practice I find has sometimes been to have two instruments, one, an absolute conveyance of the ship, the other a deed of defeazance; the former only being registered at the custom-house. In such a case, a difficulty arises in enforcing in a court of justice the mortgagor's right of redemption by setting up the unregistered deed in opposition to the registered; and from thence has proceeded the idea that since the register acts no transfer of property in a ship could be made, except by way of absolute sale, and consequently that no valid mortgage of a ship could be made since these Acts. But this course of reasoning is founded in mistake. If the fact were established that the form of register prescribed by the Acts were applicable only to the case of an absolute sale of a ship, and could in no way be suited to a transfer by way of mortgage, still it would not follow as a consequence that no other than an absolute sale was intended to be allowed, but merely that the provisions of the Act should be deemed to

apply only to an absolute sale, leaving all other transfers of property untouched by the Acts, to be governed by the same rules and forms which prevailed before the Acts were passed, there being nothing either in the letter or spirit of the Acts unfavourable to the continuance of the mortgage of ships; and it being utterly unreasonable that such mortgage should be rendered invalid merely from the non-compliance with a form of register, which, according to the hypothesis, could in no way be adapted to it. It is impossible not to see that the greatest inconveniences would arise if either of these alternatives prevailed—if any prohibition or restraint were imposed on the right of mortgaging ships—or if the guards provided by the register acts against foreigners acquiring an interest in British ships did not extend to this mode of transfer of property. It is therefore of great importance to have it clearly understood that for neither of these positions is there any foundation. The contrary of both is assumed in the late case of Wilson v. Heather (*a*), decided by the unanimous opinion of the Court of Common Pleas without any doubt on either point, and in that opinion I entirely concur. I have no doubt that the power of mortgaging a ship exists as fully since the register acts as it did before, provided the requisites prescribed by the register acts are observed. I think there is no difficulty in effectuating this. The mortgage will be made by the usual bill of sale of the ship, containing in the same instrument a defeazance or condition of re-transfer on payment of the mortgage money. This bill of sale

(*a*) 5 Taunt. 642.

must contain the recital of the certificate as the Act directs, and must be fully indorsed on the certificate of registry if the ship be in port, or if at sea a full copy of it must be transmitted to the custom-house. The form of indorsement will be the one prescribed by the Act, but with the addition of the defeazance to express the true nature of the contract between the parties, whenever it becomes material to resort to evidence of it. There is nothing in the Act to prevent such an addition being made to meet the exigency of the case. A greater deviation from the form prescribed by the Act was sanctioned by the Court of Common Pleas, in the case of a partial transfer of the interest in a ship (*a*); and an ingenious living writer (*b*) has well observed, that the Act seems to require a similar deviation in the case of a mere contract for the sale of a ship, which the Act directs to be registered, but which cannot be in the exact words of the form prescribed. A liberal interpretation of the Act must be adopted to make form give way to substance. In the subsequent forms to be observed at the custom-house the defeazance will probably not be noticed either in the entry indorsed, or the oath, or in the memorandum made in the book of registers, but adhering simply to the form prescribed by the Act, it will be registered as an absolute bill of sale. But neither the mortgagor nor mortgagee can suffer by that omission. The statutes invalidate the transfer only in the event of a neglect of the pre-

(*a*) Underwood v. Miller, 1 Taunt. 387.

(*b*) Mr. (now Chief Justice) Abbot on merchant ships, &c. p. 44, and note (*y*).

scribed requisites *by the parties*, not for any mistake or neglect by *the public officers*. And in the event of any dispute of the title in a court of justice, the proper evidence of title will be the original documents themselves, not any imperfect abstract made of them at the custom-house. By that abstract the mortgagee will, it is true, appear the sole and absolute owner, and so he is *pro tempore* till redemption; but the mortgagor's right to call for a re-transfer will appear from the bill of sale fully indorsed on the certificate if the ship be in port, or if at sea, by a full copy transmitted to the custom-house; and I see no ground on which that right can be resisted. It is a mistake to suppose that the owner of a ship cannot make a transfer of property without parting entirely and irredeemably with all his interest. The right to redeem, if it be the contract of the parties (as it was in the present case between Llewellyn and Smith) even though not noticed at the custom-house, still continued to exist, and passed by the second bill of sale from Llewellyn to Thompson, by which Thompson stood in the place of Llewellyn, and acquired against him and his assignees the right which he seeks to enforce by this bill, of possessing himself of the certificate when the ship returns to port, for the purpose of indorsing thereon within the ten days his bill of sale. To secure the attainment of that right, the plaintiffs are, I think, clearly entitled to the assistance of a Court of Equity, and to prevent the infraction of it, which cannot take place without the breach of an express contract, and the violation of every principle of equity and justice. On these grounds, I think the prayer of the bill is proper; and

as the ship has by consent been sold, subject to the decision of the Court, the purchase-money must be paid to the plaintiffs; but as it is a case in which there was great doubt, I give no costs."

The reasoning of his Honor is clear and conclusive, for it is evident a contract or agreement registered, is within the very words of the statute; and therefore a title to a ship *may* subsist in equity. All that is asked is, that the equitable title shall be as notorious as the legal. That parol evidence is admissible to shew what the equitable interests of the parties are, if the requisites of the statutes have been complied with, is shewn in a recent case (*a*). In that case two partners appeared as joint owners on the register; and on a question sent from Chancery to the judges of the King's Bench, they certified that as the names of both partners appeared on the register, the provisions of the Acts were satisfied, and that they did not operate to prevent the shewing how and in what proportions the several owners were respectively entitled. In fact, the cases of Hibbert v. Rolleston, Mestaer v. Gillespie, were mortgages, as was also that of Wilson v. Heather (*b*), in none of which does the doubt seem to have occurred.

In a preceding part of this treatise (*c*), when considering the doctrine laid down in Eaton v. Jaques,

(*a*) *Ex parte* Jones, 4 M. and S. 450.
(*b*) 5 Taunt. 642.
(*c*) *Supra*, p. 122.

viz. that an assignee of leaseholds by way of mortgage was not liable to action for rent in arrear and breach of covenant, unless he had taken possession, it was stated that on the like principle it was held by the Court of King's Bench, in the case of Chinnery v. Blackburne (*a*), that a mortgagee of a ship, of which he was out of possession, could not be considered the owner, so as to maintain an action at law for freight; and that in the case of Jackson v. Vernon (*b*), the Court of Common Pleas decided, that a mortgagee so placed was not answerable for goods furnished the ship. It was also shewn that in the case of Westerdell v. Dale (*c*), Lord Kenyon expressed an opinion, that a mortgagee, whether in or out of possession, was the legal owner, and must be so considered; and it was added, that the case of Eaton v. Jaques was much disapproved, and had been very recently expressly overruled (*d*). It may therefore be thought to follow as a consequence, that the case of Jackson v. Vernon is not law, and that a mortgagee of a ship would be liable as legal owner, whether he had taken actual possession or not. But the present Lord Chief Justice in his able Treatise on the Law of Shipping (*e*) has remarked, that the title to a ship may furnish evidence that repairs are made or stores furnished under the authority and for the benefit of the legal owner, as in fact they gene-

(*a*) 1 Hen. Blackstone, 117, note. (*b*) Ibid.
(*c*) 7 Term Rep. 312.
(*d*) Williams v. Bosanquet, 1 Brod. and Bing. 238.
(*e*) Page 21.

rally are, *but it does no more;* and therefore if it appear that they were made or furnished under the authority and for the benefit of another, the legal owner will not be answerable. For this position there are two clear authorities. In the first case (*a*), a purchaser of a ship having, previous to the completion of the conveyance, ordered the master to take the vessel to a shipwright to be repaired, it was held that the seller, although the legal owner, was not liable; and secondly (*b*), where a ship was sold in the interval between an order for stores given by the seller, and their delivery on board, the purchaser was held not responsible. The principle deciding these cases is, that the credit was not given to the legal owner, but to a third person. The like principle may apply to the case of mortgagor and mortgagee, in case it can be shewn that the credit was given to the mortgagor personally, but otherwise it is apprehended the mortgagee must be liable. It may be also proper to add in this place, that *the register alone* is not even *prima facie* evidence to charge a person as owner of a ship, in a suit between private individuals (*c*), nor is the bill of sale, unless it appears to have been accepted by the assignee (*d*).

The freight, if in a charter-party, may it seems be assigned independent of the ship, and will not be

(*a*) Young and another v. Brander and another, 8 East, 10.

(*b*) Trewbella v. Rowe, 11 East, 435.

(*c*) Frazer v. Hopkins and another, 2 Taunt. 5.

(*d*) Tinkler v. Walpole, 14 East, 226; *et vide* Cooper v. South, 4 Taunt. 802. Price v. Anderson, ibid. 652.

within the registry acts; and equity will grant an injunction to prevent payment to the mortgagor (*a*).

But otherwise the earnings cannot, it seems, be separated from the ship itself (*b*).

(*a*) Mestaer v. Gillespie, *supra*.
(*b*) Speldt v. Lechmere, *supra*. Abbott on Shipping, 31.

CHAPTER XVII.

Mortgages of Stock.

The late Master of the Rolls remarked, that public stocks or funds are, in fact, *perpetual annuities* granted for ever, redeemable by the public. They are a mere right; and the circumstance that Government is the debtor makes no difference. They constitute a mere demand of dividends as they become due, having no resemblance to a chattel moveable or coin-money, capable of possession and manual apprehension. He therefore determined, that if stock be transferred into the name of a married woman, and her husband die in her lifetime, without having accepted the stock in the Bank books, or otherwise reduced it into possession, the stock will survive to the wife, although the husband and wife should in his lifetime have signed partial transfers of the stock (*a*).

In another case (*b*), the Master of the Rolls remarks, there is a very untechnical expression used with regard to stock; there is literally no such thing as one hundred pounds stock; knowing, however,

(*a*) Wildman v. Wildman, 9 Ves. jun. 174.
(*b*) Kirby v. Potter, 4 Ves. jun. 751.

that in common parlance, people, speaking of stock, will so express themselves, the Court will apply it.

Public stock may become *the subject of loan*, or it may be itself *the security* for the repayment of money.

It was formerly doubted whether a loan of stock was lawful, or whether it was not prohibited by the 7 of Geo. 2. cap. 8. s. 8. which enacts that "all contracts and agreements whatsoever, which shall from and after the first day of June, 1734, be made or entered into for the buying, selling, assigning, or transferring of any public or joint stock or stocks, or other public securities whatsoever, or of any part, share, or interest therein, whereof the person or persons contracting or agreeing, or on whose behalf the contract or agreement shall be made, to sell, assign, and transfer the same, shall not, at the time of making such contract or agreement, be actually possessed of or entitled unto in his, her, or their own right, or in his, her, or their own name or names, or in the name or names of a trustee or trustees to their use, shall be null and void to all intents and purposes whatsoever; and all and every person and persons whatsoever contracting or agreeing, or on whose behalf and with whose consent any contract or agreement shall be made, to sell, assign, or transfer any public or joint stock or stocks or other public securities, whereof such person or persons shall not at the time of making such contract or agreement be actually possessed of or entitled in his, her, or their own name or names, or in the name or names of a trustee or

trustees, to their use or their own right as aforesaid, shall forfeit and pay the sum of 500*l.* to be recovered by action of debt, bill, plaint, or information, in any of his Majesty's Courts of Record at Westminster, in which no essoign, privilege, protection, or wager of law, or more than one imparlance shall be allowed; one moiety thereof to the use of his Majesty, his heirs and successors, and the other moiety thereof to the use of him, her, or them who shall sue for the same; and all and every broker or brokers, agent or agents, who shall negotiate, transact, or intermeddle in the making or procuring to be made any such contract or agreement as aforesaid, and shall know that the person or persons by whom or on whose behalf such contract or agreement shall be made is or are not possessed of or entitled unto the stock or security, concerning which such contract or agreement shall be made in his, her, or their own name or names, or in the name or names of a trustee or trustees for their use or right, shall, for every such offence, forfeit and pay the sum of 100*l.* to be recovered by action of debt, bill, plaint, or information, in any of his Majesty's Courts of Record at Westminster, in which no essoign, privilege, protection, or wager of law, or more than one imparlance shall be allowed, one moiety thereof to the use of his Majesty, his heirs and successors, and the other moiety thereof to the use of him, her, or them who shall sue for the same."

The question was tried in an action of assumpsit, before Lord Kenyon (*a*), when a verdict was found

(*a*) Sanders v. Kentish and Hawksley, 8 T. R. 162.

for the plaintiff, subject to the opinion of the Court of King's Bench. The circumstances were, the plaintiff, Sanders, who was a clergyman, lent the defendant, Kentish, who was a stockjobber, 3000*l.* 4 *per cent.* annuities; the defendant, Hawksley, was a surety with Kentish for the re-transfer. The defence set up to the action by the defendants was, that the loan was within the prohibition of the 7 Geo. 2. cap. 8. It was answered, that the transaction was within the saving of the 11th section, namely, "that nothing in this Act contained shall extend or be construed to extend to hinder or prevent any person or persons from lending any sum or sums of money, or any public or joint stock, or other public securities whatsoever, or any part, share, or interest therein, or to prevent or hinder any defeazance, contract, or agreement being made and entered into for the redelivering, assigning, or transferring such public or joint stock, or other public securities, or any part, share, or interest therein, upon the repayment of the sum or sums of money which shall have been lent and borrowed thereupon, with interest for the same, so as no premium or other consideration whatsoever be paid to or received by the person or persons lending such money, for or in consideration of such loan, more than legal interest." In this opinion the Court coincided. Lord Kenyon remarked, the Act is intituled, "An Act to prevent the infamous practice of stockjobbing." But if the defendants' objections are to prevail, the title of the Act ought to be altered, and it should run thus: "An Act to encourage the wickedness of stockjobbers, and to give them the exclusive privilege of cheating the rest of mankind."

A loan of stock is therefore lawful; and the parties may agree that a sum of money equal to the dividends shall be paid in the mean time, although the dividends shall exceed five *per cent.* on the money produced by the sale of the stock; for the lender takes the hazard of the rise and fall of the market price; and if an action is brought at law on a bond given as a security for the re-transfer of stock, in estimating the measure of damages, the lender will be entitled to recover the highest value of the stock on the day of trial (*a*).

It is not material whether the stock is actually transferred to the mortgagor, or whether the stock is sold out, and the net produce paid to him (*b*).

And if a person is indebted to another man in a sum of money, an agreement between them that the debtor shall transfer to the creditor within a given time such a quantity of stock as the amount of the debt would have purchased on the day of the agreement, and pay dividends in the mean time, is lawful (*c*).

The chief question in matters of this sort is, whether the transaction is usurious? and the general principle to be deduced from the cases seems to be, that if the principal money lent is not put in hazard, and the creditor may obtain an advantage exceeding

(*a*) Shepherd v. Johnson, 2 East, 211.
(*b*) Tate v. Wellings, 3 T. R. 537.
(*c*) Maddock v. Rumball and another, 8 East, 304.

legal interest, the loan will be tainted with usury; but some of the adjudged cases are not easily reconcileable to this principle.

In Barnard v. Young (*a*), heard before the late Master of the Rolls, it appeared that 10,000*l.* had become due on bond, and the agreement was to transfer to the creditor, on a given day, so much stock as upon the 12th day of February then last, on which day the 10,000*l.* secured by bond became due, could have been purchased with the 10,000*l.*; or, to pay the said 10,000*l. at the option of the creditor*, and also in the mean time to pay interest at five *per cent.* on the 10,000*l.* The Master of the Rolls said, this was in fact an usurious contract; for the principal money was never at hazard, the creditor was at all events sure of having that with lawful interest, and had the chance of an advantage if the stock rose. It was usurious to stipulate for that chance.

The Master of the Rolls in Barnard v. Young, distinguished that case from the case of Forrest v. Elwes (*b*), which had been heard before Lord Alvanley, and the ground of distinction taken by the Master of the Rolls was, that in Forrest v. Elwes there was no option. In that case it appeared, that Mr. Elwes had in the year 1766 lent Commodore Forrest 8000*l.* Old South Sea Annuities, valued on the day of transfer at 7170*l.* The condition of the bond was, that Forrest should, at the end of six months, retrans-

(*a*) Barnard v. Young, 17 Ves. jun. 44.
(*b*) Forrest v. Elwes, 4 Ves. jun. 492.

fer the 8000*l.* stock, and pay interest *at five per cent. on the* 7170*l.* Breach was made by Forrest in the condition of the bond by non-transfer of the stock within the six months, and a long period elapsed, during which part of the principal was discharged, but a great arrear of interest accrued on the residue. After the death of Forrest a suit was instituted in equity by his executors, in which Elwes was a defendant, and it was directed that the balance due to Elwes should be paid, and that the master should take an account of the money due. In the year 1798 the master reported that 6500*l.* was due for principal, with a very large sum for interest. It was objected on the part of the executors, that the master ought to have reported that so much was due as would purchase 8000*l.* South Sea Annuities, when the same might be purchased at some given period of time, after deducting the several sums already paid on the bond. On the other hand it was contended, that Mr. Elwes was entitled to the residue of the 7170*l.* The Master of the Rolls said, the question was, what was the fair measure of the damage? and asked, whether he should do justice in giving the same annuities, which were formerly worth eighty-nine *per cent.* and were then much depreciated? and he overruled the exception. Now it is with much deference suggested, that the effect of this decision was, after the expiration of the six months, to remove from Mr. Elwes the hazard alluded to in Barnard v. Young, and to give him the same chance of rise without the risk of fall which vitiated the transaction in that case; unless it be supposed that if after the expiration of the six months, the stock had

risen in value, Mr. Elwes would not have been entitled to the advantage of the rise, but have been kept to the 7170*l.*, which it seems difficult to conceive, for under such a determination Mr. Elwes would have sustained an actual loss through the default of the borrower.

There is also a case (*a*) heard in the King's Bench, which appears at variance with the principle before stated. The circumstances were; that the defendant Wellings applied to the plaintiff's testator to advance him a sum of money, which was agreed to, but the testator said he should expect the same interest which he received in the short annuities, namely, eight and a half *per cent.* To this the defendant assented. The money was accordingly raised by the testator by sale of short annuities, and the agreement was, that the defendant should replace the stock by the 1st day of September 1785; but if it was not replaced by that time, then he should *repay the money raised* on the 1st of January 1786, and in the mean time should pay *such interest as the stock would have produced.* On the trial Lord Kenyon left it to the jury to say, whether this was intended as a *bonâ fide* loan of stock to be replaced at a subsequent time, or repaid in money; or whether it was intended to be a loan of money, and the present device a mere colour for usury; the jury found it a mere loan of stock, and gave the plaintiff a verdict. A rule was afterwards obtained to shew cause why

(*a*) Tate v. Wellings, 3 Term. Rep. 537.

the verdict should not be set aside, and a new trial granted on the ground of usury, and it was argued that a contract for a loan of stock to be replaced on a given day, or to be repaid in money, reserving a greater interest than the law allows, in other cases was clearly usurious. The Court considered that they were precluded by the verdict of the jury from considering whether the transaction was a mere cloak for usury. Lord Kenyon thought that as the transaction was legal during the first year, there was nothing superadded to make it usurious. Mr. Justice Ashhurst thought, that from the contract the creditor derived no advantage, for he was only to receive in the mean time the same interest which the stock would have produced; and Mr. Justice Buller said this was not like the case cited from Cro. James (*a*), where the principal was always secure, for here the testator might have been a loser in the event of the stock rising after the first year. A new trial was therefore refused.

On consideration of the foregoing case, it is respectfully submitted, that the opinion given by Lord Kenyon, viz. that there was nothing superadded after the first year to make the transaction usurious, appears singular, considering that it was an agreement to repay *a sum of money* with eight and a half *per cent.* interest. The reason given by Mr. Justice Ashhurst is yet more remarkable, for it would seem to imply that an agreement to repay

(*a*) Roberts v. Tremayne, Cro. Jac. 507.

money raised by the sale of stock, would not be usurious, if the rate of interest did not exceed the dividends of the stock sold. The reasoning of Mr. Justice Buller, namely, that the lender ran the hazard that the stock might rise after the first year, would apparently apply to any loan of money raised by the sale of stock.

During the late war when the price of stock was so low as to render more than *5l. per cent.* interest, mortgages of stock were frequent, and almost superseded money mortgages; they have now nearly disappeared. The most prudent course in such species of mortgage is, to make the land redeemable on the replacing of the stock on a given day, and payment of dividends in the mean time. The cases however seem to imply that it will not be unlawful to stipulate for the re-transfer of the stock, and to reserve five *per cent.* on the amount of the money produced by the sale, instead of the dividends, but the lender cannot be advised to rely on the case of Tate v. Wellings, as an authority for the proposition, that he may stipulate for the re-transfer of stock at a given day, and in default of transfer, then for the payment of the amount of the money produced by the sale, and reserve a rate of interest equal to the dividends. The case of Forrest v. Elwes may be considered as decided on the particular circumstances of hardship attending the case, and not as an authority for a general rule, that under a similar proviso, the Court of Chancery would decree a redemption on payment of the money instead of the transfer of stock, in order to save the lender from a loss; and it

may be concluded from the case of Barnard v. Young, that the lender must not reserve to himself an option to require the transfer of stock, or payment of the money (*a*).

If stock is itself made the security for money, and the day appointed for payment is passed, the mortgagee may at once proceed to sell the stock, and repay himself, principal and interest, without any authority from the mortgagor, and without filing his bill of foreclosure (*b*). But the mortgagee will be decreed to account for the surplus (*c*).

(*a*) For a Precedent of a Mortgage of Stock, see Appendix, No. 7.

(*b*) Tucker v. Wilson, 1 P. Wms. 261. Lockwood and others v. Ewer, 2 Atk. 303.

(*c*) Harrison v. Hart, Comyns, 393. *Nota.* The circumstances of this case form a striking proof of the extent of the South Sea bubble, for it appears that 20,000*l.* South Sea stock was transferred as a security for 70,000*l.* money and interest, and that the 20,000*l.* South Sea stock actually produced the sum of 86,291*l.* 17*s.* 8½*d.* By the deposition of one witness, Hart agreed to sell him 1000*l.* South Sea stock at 1000 *per cent.* premium.

CHAPTER XVIII.

On Liens in general.

It is perhaps hardly within the scope of the present treatise to enter into a consideration of the general doctrine of lien; of that particular branch which is confined to equity, and relates to real estate, mention has been already made (*a*). A few observations on the subject may, however, be not considered in this place irrelevant.

Lien may subsist both at law and in equity, although there are some liens which subsist in equity only (*b*).

Liens are general or specific. By the common law, every one has a lien on a specific article delivered to him to work on for the amount of the labour done; and this has even been extended to give a certificated conveyancer or special pleader a lien on the papers in his hands, so far as respects his costs on that particular account (*c*). But this species of lien does not extend to general balances or money due on former or different accounts (*d*).

The cases turn principally on the point, whether

(*a*) *Vide* Chapter 13, Book 2. (*b*) 2 Mer. 403.
(*c*) Hollis v. Claridge, 4 Taunt. 807.
(*d*) *Ex parte* Ockenden, 1 Atk. 235.

the lien is confined to the particular transaction, or is extended to the general balance?

Lord Mansfield has stated (*a*), that the convenience of commerce and natural justice are on the side of liens, and that therefore, of late years, Courts have leant that way: 1st, where it is *an express contract;* 2dly, where it is implied from the usage of trade; or, 3dly, from the manner of dealing between the parties on the particular case; or, 4thly, where the party has acted as factor. It may not be improper briefly to consider the doctrine under these several divisions:

First: In the case of an express contract. The Court of King's Bench has decided, that an agreement amongst a number of dyers, bleachers, &c. entered into at a general meeting that they would not receive any goods without having a lien on the goods in hand for a general balance, was good in law; and that every person afterwards sending goods to such persons with notice of that agreement, must be considered as assenting to it and bound by it (*b*).

Secondly: In the case of implication from the usage of trade. On this principle it was decided, that a packer had a lien for his general balance, even including loans of money (*c*). It is also held that bankers (*d*), and policy brokers (*e*), have a general

(*a*) 4 Burr. 2221.
(*b*) Kirkman v. Shawcross, 6 Term Rep. 14.
(*c*) *Ex parte* Deeze, 1 Atk. 228.
(*d*) Davis v. Bowsher, 5 Term Rep. 488.
(*e*) Cooke's Bankrupt Laws, 442.

lien for the balance of their accounts. But dyers (*a*) and common carriers (*b*), it seems, have not a lien by general usage.

Thirdly: From the manner of dealing between the parties, as in the case of Downman v. Matthews (*c*), which was a transaction between a clothier and a dyer, and there being evidence that they always made up their accounts by giving mutual credit, the lien for the general balance was allowed.

Fourthly: As to factors. In the case of Kruger v. Wilcox (*d*), Lord Hardwicke took the opinion of four merchants, who agreed, that if there is a course of dealings and general account between the merchant and the factor, and a balance is due to the factor, he may retain the ship and goods or produce, for such balance of the general account, as well as for the charges, customs, &c. paid on the account of the particular cargo; but that if the factor deliver up the goods to the merchant, by his parting with the possession he parts with the specific lien; and the Court decreed accordingly.

It is now also decided, that a solicitor has a general lien for his costs, &c. on the papers in his hands (*e*); and it seems he may obtain an order to

(*a*) *Vide* Green v. Farmer, 4 Burr. 2214. Close v. Waterhouse, 6 East, 525.

(*b*) Rushforth v. Hadfield, 6 East, 518.

(*c*) Prec. in Cha. 580. *Et vide* Rushforth v. Hadfield, *supra*.

(*d*) Kruger v. Wilcox, Amb. 254.

(*e*) Stevenson v. Blakelock, 1 M. and S. 535.

prevent his clients from receiving money recovered in a suit, in which he has been employed for him, until his bill be paid (*a*). But if his client substitutes another solicitor, he cannot prevent the cause coming to a hearing, subject to his lien (*b*), nor can he prevent his client discontinuing the action, subject to the costs incurred (*c*).

The late Master of the Rolls has observed, that as to liens of one man on goods in the possession of another, he knew of no difference between the rules of decision in courts of law and in courts of equity (*d*).

To create the lien, the goods must come into the *actual possession* of the party claiming it, on which principle it was held (*e*), that if a factor, in consideration of goods being consigned to him, accept bills drawn on him by the consignor, and pay part of the freight before the goods arrive, and afterwards become insolvent before the bills are due, the consignor may stop the goods *in transitu*.

It appears from the cases to be decided, that the right of lien does not extend beyond the time of *actual possession*, and therefore if the factor, &c. deliver up the goods before payment of his account, his lien is gone, and he cannot stop the goods even *in*

(*a*) *Vide* Dougl. 101.
(*b*) O'Dea v. O'Dea, 1 Sch. and Lefroy. 315.
(*c*) Merrywether v. Mellish, 13 Ves. jun. 162.
(*d*) Gladstone v. Birley, 2 Mer. 403.
(*e*) Kinloch v. Craig, 3 Term Rep. 119.

transitu (*a*). And in one case it was held, that a delivery of part only destroyed the lien (*b*).

It is also decided, that if the factor, solicitor, or other person having a specific or general lien on goods in his hands take a specific security, the lien is totally gone (*c*), so far as respects the debt for which the security is taken.

(*a*) Sweet v. Pym, 1 East, 2. *Et vide* Amb. 254.
(*b*) *Ex parte* Gwynne, 12 Ves. jun. 383.
(*c*) Cowell v. Simpson, 16 Ves. jun. 275.

CHAPTER XIX.

Of Assignments of Mortgage.

In equity, the mortgage debt is the principal, the land the accessory. An assignment of mortgage is, therefore, in equity, a transfer of a debt with its attendant securities; and, as the accessory always follows the principal, it results that when the debt is satisfied, the security is determined.

On this principle, equity holds, that on an assignment of mortgage, without the concurrence of the mortgagor, the assignee, standing in the place of the original creditor, is subject in all respects to the like equities and settlement of accounts as the mortgagee himself would be (*a*). In Matthews v. Wallwyn (*b*), Matthews mortgaged to Baker for 2000*l*. The mortgage being paid off by Shepheard, who was Matthews's attorney, Matthews executed to Shepheard a bond for 2000*l*., and Baker assigned the mortgaged premises to Shepheard, who afterwards deposited the bond and deed with Hercy and Co. for 2000*l*. Hercy and Co. requiring payment, Shepheard applied

(*a*) Earl of Macclesfield v. Fitton, 1 Vern. 169. 1 Ch. Ca. 68. Matthews v. Wallwyn, 4 Ves. jun. 118. Williams v. Sorrell, *ibid.*

(*b*) *Supra.*

to Wallwyn and Co. to lend him 2000*l.* They agreed to open an account with him on a deposit of the securities and his own note of hand. The securities were accordingly redeemed out of the hands of Hercy and Co., and deposited by Shepheard with Wallwyn and Co. Shepheard became bankrupt; and, subsequently, under a decree of Chancery, his assignees executed an assignment of the mortgage to Wallwyn and Co. Matthews had no notice of the dealings with Hercy and Co. and Wallwyn and Co. Shepheard had been in the habit of receiving and paying large sums on account of Matthews. The bill was filed by Matthews against Wallwyn and Co. for redemption; and it stated that, subsequently to the settlement of an account between Matthews and Shepheard in October 1794, which was subsequent to the deposit to Wallwyn, Matthews had discovered that Shepheard had received divers sums of money not accounted for by him, and that the latter had, since the settlement, received other sums, and that on deducting these sums, a considerable balance would be due to Matthews. Wallwyn and Co. submitted that they had a specific lien for their balance. The Lord Chancellor, after stating the question to be whether the assignee of a mortgage had a right to be paid according to the sum that appeared due on the mortgage deed, whatever might be the state of the account between the mortgagor and mortgagee, and noticing the practice of conveyancers not to recommend as a good title, an assignment of a mortgage, without making the mortgagor a party, and being satisfied that the money was really due, proceeded to state the particulars of the case of Lunn v. Lodge

and others, from a note of the case in his possession; from which it appeared that Lodge mortgaged to Pitman who assigned to Saint John. Lodge and Pitman both became bankrupt. The bill was filed by the assignees of Lodge, insisting that nothing was due between the estates. Lord Thurlow directed the Master to enquire "what was due at the time of mortgage? what was due at the time of the assignment? and what remained due?" The Master reported that 7000*l.* was due *from Pitman to Lodge;* and it was decreed that the assignments were void against the estate of Lodge. This, the Lord Chancellor said, was a direct authority in favor of Matthews. He then noticed that if an action was brought on the bond in the name of the mortgagee, which, the bond not being assignable at law, it must be (*a*), the mortgagor would pay no more than was really due on the bond; and if an action was brought on the covenant, the account must be settled in that action; and, in a Court of Equity, the condition of the assignee could not be better than it was at law. Therefore the plaintiff must be at liberty to redeem upon payment of what the Master should find due on the original mortgage to Shepheard; and he directed the account to be taken in exactly the same way as Lord Thurlow had done, viz. an account of what was due at the time of the mortgage; what was due at the time of the assignment; and what was then due.

(*a*) As to this, see remarks *infra* on the case of the debt being secured by an *assignable instrument*.

The case of Matthews v. Wallwyn is a leading authority, that the mortgagor not concurring in the assignment, is not bound by the amount appearing due on the face of the mortgage. In a case (*a*) decided soon after that of Matthews v. Wallwyn, the same doctrine was acted upon. It appeared that Sorrell mortgaged to Clifton. Clifton assigned to Williams, without the concurrence of Sorrell, who, after the assignment, and without notice of it, made several payments to Clifton. The property was leasehold, lying in Middlesex, and the deed of assignment was registered. The bill was filed by the assignee, praying a foreclosure, and charging the mortgagor with notice by reason of the registry; but the point was scarcely contended by the counsel for the plaintiff. The decree was, that the defendant might redeem on payment of what was due, deducting the payments made to Clifton. In this case, the mortgagor had made a tender of *the balance* to the assignee, subsequent to the filing of the bill; in consequence of which the costs of the suit were allowed the assignee up to the time of the tender only.

This doctrine has been confirmed by Lord Eldon (*b*), and may be considered as settled, as well in respect to payments before and after the assignment as also on a running account. The concurrence of the mortgagor in the assignment of a mortgage consequently should, if possible, ne-

(*a*) Williams v. Sorrell, 4 Ves. jun. 389.
(*b*) Chambers v. Goldwin, 9 Ves. jun. 234.

ver be dispensed with; and in cases in which, from unavoidable circumstances, an assignment is taken from the mortgagee only, the precaution should be had of obtaining a covenant from the mortgagee, that the money alledged to be owing is actually due; and notice of the assignment should be given to the mortgagor with the least practicable delay.

The mortgagor not being bound by the settlement of account between the mortgagee and assignee, *à fortiori* he cannot be prejudiced by any agreement between them to increase the amount of the *principal* due; and, consequently, the arrears of interest at the time of the assignment cannot, generally speaking, without his concurrence, be converted into principal, and tacked to the mortgage (*a*). And even with his consent, the interest cannot, *with notice*, be tacked to the prejudice of other creditors having then a lien on the estate (*b*). But it is submitted that as equity will on the settlement of accounts allow the necessary costs of defending and maintaining the title (*c*), renewal of leases (*d*) and the like with interest in the mean time, the amount of such costs may on an assignment be tacked to the principal,

(*a*) Macclesfield v. Fitton, *supra*. Ashenhurst v. James, 3 Atk. 271. Porter v. Hubbard, 3 Atk. ch. 78, *et vide* Matthews v. Wallwyn, *supra*.

(*b*) Digby v. Craggs, Amb. 612.

(*c*) Godfrey v. Watson, 3 Atk. 518.

(*d*) Lucam v. Mertins, 1 Wils. 34. Manlove v. Bale, 2 Vern. 84.

and will carry interest without the mortgagors' concurrence, and have preference to other subsisting charges.

A further advantage arising from the concurrence of the mortgagor in the assignment is, that in such case the mortgagee need not be made a party to a bill of redemption, which otherwise is necessary, that he may account for the profits received in his time (*a*).

There is another most important point to be attended to by the mortgagee in an assignment of mortgage, viz. that if he is *in possession*, he is considered in equity, in some measure, in the light of a trustee, and accountable for the profits; and, therefore, if without the assent of the mortgagor, he assigns over the mortgage to another, he will be held liable to account for the profits received *subsequently* to the assignment (*b*), on the principle that, having turned the mortgagor out of possession, it is incumbent on him to take care in whose hands he places the estate. A query is added in Equity Cases Abridged, whether if the mortgagor hides so that he cannot be served with a *subpœna*, the mortgagee in possession may not assign without being accountable for the subsequent profits; but the query only tends to shew the general rule.

If the assignee is a *purchaser* of the mortgage debt,

(*a*) 2 Eq. Ca. Ab. 594.
(*b*) 1 Eq. Ca. Ab. 328.

or, in other words, pays a less sum for it than the amount due, he will be entitled to the full benefit of his purchase (*a*). It has however been questioned, and an attempt made to confine the purchaser to the amount of the sum which he actually paid on the assignment; but, as observed by Lord Cowper, since he runs the hazard of a loss, he ought to have the benefit of the gain (*b*). If indeed the purchaser is in the situation of *a trustee* for the owner of the estate, then equity will hold that he made the purchase for the benefit of the estate, and consequently an executor, or guardian, or trustee, shall be only repaid the sum which he actually gave (*c*). In like manner, if the *heir at law* is the purchaser, and there be judgment or specialty creditors, he shall not have the benefit of the assignment beyond the amount of the purchase to their prejudice (*d*); and the like doctrine was, in one case (*e*), attempted to be extended to the instance of a purchase by a stranger to the estate, but Lord Hardwicke has remarked (*f*), he knew no subsequent case in which it had been laid down as a general rule, but held only with regard to agent, trustee, heir at law, or executor (*g*). And even with regard

(*a*) Phillips v. Vaughan, 1 Vern. 336. Baker v. Kellett, 3 Rep. Ch. 13. Nels. 117. Anon. 1 Salk. 155. Ascough v. Johnson, 2 Vern. 66. Morrett v. Paske, 2 Atk. 53. Darcy v. Hall, 1 Vern. 49.

(*b*) Anon. 1 Salk. 154.

(*c*) Morrett v. Paske, *supra*.

(*d*) Brathwaite v. Brathwaite, 1 Vern. 335. Long v. Clopton, *ibid.* 464.

(*e*) Williams v. Springfield, 1 Vern 476. *et vide* Long v. Clopton, *supra*.

(*f*) Morrett v. Paske, 2 Atk. 53, 54.

(*g*) *Et vide* Bromley v. Holland, 5 Ves. jun. 620, note.

to those persons, if the mortgage is purchased for the purpose of protecting a subsequent incumbrance to which they are entitled in *their own right*, they may take the full benefit of the prior security (*a*). In a subsequent chapter, this doctrine will be more fully dilated on. These general observations may be therefore sufficient in this place.

At law, the debt being a chose in action, is not, in general, assignable. A power of attorney must be therefore given by the mortgagee to the assignee, to enable him to proceed in his name on the covenant and bond. The debt may indeed, under special circumstances, be assignable at law as if secured by a negotiable instrument, such as a bill of exchange, which passes by indorsement; and Mr. Powell (*b*) has suggested, whether in such a case the general rule before stated (*c*) as to the liability of the assignee to the state of the account between the mortgagor and mortgagee would apply; for the assignee or indorsee has a legal right in the debt, and a legal remedy at law, which equity will not take from him. There certainly seems considerable force in the reasoning.

The 55 Geo. 3. cap. 184. has provided, that on any transfer or assignment of any mortgage, in all cases where the person entitled to the right of redemption or reversion shall not be made a party to

(*a*) Darcy v. Hall, 1 Vern. 49.

(*b*) Powell on Mortgage, page 973, 4th edit.

(*c*) *Supra*, page 215.

such transfer, and also where the person, who *originally* made the mortgage, shall continue entitled to the right of redemption or reversion, and shall be made a party to such transfer, the common deed-stamp only shall be payable, *provided no further sum of money or stock be added to the principal money or stock already secured.* The Act then provides, that, *in all other cases*, such transfer shall be charged with the same duty or duties as an original mortgage.

The effect of the clause is, that if the equity of redemption is granted away to a stranger previously to the assignment, and the grantee of the equity concurs in the assignment, the full duty will be payable, which legislative enactment is founded, it is presumed, on the idea, that the assignee obtains the further personal security of the grantee. If the person originally making the mortgage die, the better opinion seems to be, that his heir or personal representative stands in his situation, so that they may concur in the assignment, without rendering necessary the payment of the additional duty, and the same exemption may be thought to extend to a devisee.

A question has been raised on the effect of the clause dispensing with the payment of the mortgage-duty on the assignment of mortgage; *provided no further sum of money or stock be added to the principal money or stock already secured;* followed by the clause directing, "that *in all other cases* the assignment shall be charged with the same duty as an original mortgage." If these united clauses are

taken in their literal meaning, it would certainly seem to follow, that in every case in which a sum of money is added on the assignment of mortgage, the full duty on the whole is payable; but it is conceived that such was not the intention of the legislature, because the provision would be frustrated by the simple operation of an assignment of the original mortgage, and an indorsement dated the next day by way of further charge for the additional sum; and it cannot be presumed the legislature could mean to affix the heavy duty merely on *the form* of making the additional mortgage.

The effect however has been, to raise a doubt which is not unfrequently attended with considerable expense; for it happens that counsel on behalf of an assignee of a mortgage do not feel themselves justified in advising him, that he will be safe if he advances a further sum of money, unless the full duty be paid on the total amount of the mortgage money, in consequence of which a mortgage is sometimes perhaps unnecessarily burdened with the payment of the full mortgage-duty a second time. When the stamp act undergoes revision, this, it is hoped, will be remedied.

BOOK THE THIRD.

CHAPTER I.

Of the relative Estates of Mortgagor and Mortgagee.

HAVING treated of the origin, nature, and different modes of mortgage, it is next to be considered in what respective relative situations the mortgagor and mortgagee, until redemption or foreclosure, stand to each other; and to what privileges and restrictions, they are, during that period, respectively entitled or subject.

On the execution of the mortgage, the mortgagor becomes the equitable owner, the mortgagee the legal owner of the land; in which respective situations they remain until the land is redeemed or foreclosed. In the interim, the land and all its profits form a security for the debt. These general principles govern the decisions on this branch of the law of mortgage.

In most mortgage deeds, a proviso is inserted that until default made in payment by the mortgagor, &c., he and his heir may hold and enjoy the land and receive the profits without interruption by the mortgagee or

his heir. In some instances however, the mortgage is made without such precaution.

There is some obscurity in the books in what light the mortgagor and his heirs, during the period of their actual possession, or receipt of the rents of the land, stand in respect to the mortgagee and his heirs, whether as tenants for years, at will, by sufferance or receivers. In the case of Birch v. Wright (*a*), Mr. Justice Buller considered it sufficient to designate the parties as *mortgagor and mortgagee*, without having recourse to any other description; and he considered a mortgagor was neither tenant at will or receiver, nor was it necessary he should be so, for a mortgagor and mortgagee were characters as well known, and their rights, powers, and interests as well settled as any in the law. It is however submitted that this view of the question does not meet the difficulty, for the rights, powers, and interests of mortgagor and mortgagee, are in many instances, grounded on their respective estates in the land; and therefore we are still driven back to the original question, what are those estates? The common law recognizes no such *estate* as that of mortgagor or mortgagee independently of some other known estate or interest in the land; for the *estates* both of mortgagor and mortgagee are of a compound nature, partaking partly of legal and partly of equitable rights; and it is difficult to perceive in what manner these compound estates can, as such, be regarded in a court of law, although the possession of the mortgagor may, as noticed in the next chapter, confer on

(*a*) Term Rep. 383.

him certain privileges under the statute law and poor laws. In addition to which it may under circumstances become essential to ascertain, whether at common law there is any, and what privity of estate between the parties; for if the mortgagor in possession may be considered as tenant at will, or, under the agreement for possession, as tenant for years, to the mortgagee, there will be sufficient privity of estate between them to admit of an enlargement by release alone, which will not be the case, if he is to be considered as tenant by sufferance, or an agent or receiver. It is with deference suggested, that so long as the mortgagor or his heir is in possession of the land, and the legal ownership is in the mortgagee, there must subsist a tenancy between the parties; or otherwise the mortgagor or his heir, must hold in fee and as disseisors, for the law of England recognizes no possession independent of a tenancy, either to the lord paramount or a mesne lord. The mortgagor in possession must hold of some one, and to say that his possession is that of a mortgagor, is in fact leaving the question undecided.

The following propositions have already in substance been submitted to the public (*a*).

First: that if in the mortgage deed, there is the usual proviso for the enjoyment of the land by the mortgagor, and his heir, until default in payment &c.,

(*a*) 3rd Edition of Watkins by Morley, and Coote, page 13.

and the mortgagor is in actual possession, he may, under the agreement, be regarded as *tenant for years* to the mortgagee during the continuance of the agreement (*a*); and on his death, during the agreement, it is considered that his legal interest might be considered as devolving on his *executors*, who during the remainder of the agreement might be regarded as trustees for the heir of the mortgagor.

Secondly: If in the case of such agreement the money is not paid at the appointed time, and the mortgagor continues in possession after the determination of the agreement without any fresh agreement between the parties, he is, until payment of interest, or other recognition of tenancy, tenant by sufferance, for he came in by a rightful title, although he holds over wrongfully.

Thirdly: If the mortgage deed contains no such agreement, and the mortgagor remains the actual occupant with the consent of the mortgagee, he is strictly tenant at will (*b*).

Fourthly; If, in the latter instance, the mortgage is tranferred to another, without the concurrence of the mortgagor (*c*), the tenancy at will is determined, and the mortgagor becomes tenant by sufferance to

(*a*) Powseley v. Blackman, Cro. Jac. 659.

(*b*) Keech v. Hall, 1 Dougl. 22.

(*c*) Smartle v. Williams, 3 Lev. 387. and 1 Salk. 245. Thunder v. Belcher, 3 East, 449.

the assignee until payment of interest or other recognition of tenancy; and in all cases in which the mortgagor can be considered tenant at will, the death either of himself or of the mortgagee must determine the tenancy. If it is determined by the death of the latter, the mortgagor will be tenant by sufferance to the representative of the mortgagee, until payment of interest or other recognition of tenancy, and afterwards tenant at will. If it is determined by the death of the mortgagor, and his heir or devisee enter and hold without any recognition of the mortgagee's title by payment of interest, or other act, an adverse possession may be considered to take place (*a*).

Fifthly: In every case in which a tenancy by sufferance exists between the parties, and even where an adverse possession commences, as by the entry of the heir or devisee of the mortgagor without the consent of the mortgagee, the payment of interest is a recognition of the title of the mortgagee and evidence of an agreement that the mortgagor, or person deriving title from him, shall hold at will, and a strict tenancy at will commences (*b*).

Sixthly: If the land is in the occupation of tenants and the mortgagor is permitted to receive the rents, he has been considered to be a receiver for the mortgagee (*c*),

(*a*) *Per* Holt in Smartle v. Williams, 1 Salk. 245.

(*b*) Holland v. Hatton, Carth. 414. and 10 Vin. Ab. 418, pl. 19.

(*c*) Moss v. Gallimore, 1 Dougl. 283. yet as to this *Vide ex parte* Wilson, 2 Ves. & Bea. 252, in which Lord Eldon expressed

but, as hereafter explained, without liability to account (*a*).

It may be conceded that in most cases which occur, it is sufficient to describe the respective interests of the parties as those of mortgagor and mortgagee; but circumstances may arise, in which it will be necessary more accurately to define the actual estates of the parties at law; and with that view it is trusted that the foregoing propositions will not be found repugnant to the principles regulating the law of mortgage of real property in England.

It may be necessary to remark that, although the mortgagor is equitable owner, yet the mortgagee is more than a trustee for him, for a trustee is not allowed to deprive his *cestuique* trust of his possession, but a mortgagee may assume the possession whenever he pleases, and, in point of possession, the mortgagor is tenant at will even in equity, for a Court of Equity never interferes to prevent the mortgagee from assuming the possession (*b*).

his surprise at the mortgagor being considered as *a receiver* for the mortgagee, and attributed the doctrine to a misapplication of the principles of equity. *Vide infra*, page 334.

(*a*) *Vide infra.*

(*b*) *Per* Master of the Rolls in Cholmondeley v. Clinton, 2 Merivale, 359.

CHAPTER II.

Of the Privileges attending the Estate of the Mortgagor.

With whatever strictness the common law may have originally regarded the breach of the condition by the mortgagor, yet in modern times, the doctrine of the courts of equity, recognizing the mortgagor, (until foreclosure,) to be the actual owner of the land, has to a certain extent, with reference to the possession by the mortgagor, been acted upon, as well by the courts of common law, as by the legislature.

The statute law (*a*) has provided that the mortgagor in possession shall have the privilege of voting for the return of members to parliament notwithstanding the mortgage.

At common law his title of ownership while in possession is so far recognized as to gain him a settlement under the poor laws (*b*), but for this purpose, he must be in possession in his capacity of mortgagor, and not by fraud or wrong. For in a case (*c*) in which a mortgagee of several messuages having

(*a*) 7 & 8 William 3. cap. 25. sec. 7.

(*b*) Dougl. 632. 3 Term. Rep. 771.

(*c*) Rex v. the inhabitants of Catherington, 3 Tem. Rep. 771.

recovered in ejectment, afterwards permitted the mortgagor to inhabit one of the houses for a particular purpose, *i. e.* the overlooking of some repairs, the Court of King's Bench held, that no settlement was gained by such latter residence, for he was not in possession *as mortgagor*. And in another case (*a*) in which an estate had been conveyed to trustees upon trust to sell for payment of debts, and to pay the residue to the grantor, the grantor before sale got fraudulently into possession, and it was held, he did not by such residence gain a settlement.

A very considerable privilege annexed to the estate of the mortgagor is, that he is not bound to account for the rents and profits while in possession, even although the security shall prove insufficient. For this, the case of Colman v. the Duke of Saint Albans is in point (*b*). In that case it appeared that the office of register of the Court of Chancery had been granted by King George the Ist, by letters patent to Charles Duke of St. Albans, George Earl Cholmondeley, and Lord James Beauclerk for their lives, and the life of the survivor of them, in trust for the Duke his heirs and assigns. The Duke subsequently assigned one moiety of the fees of office to William Day for securing a sum of money. The Duke and William Day afterwards concurred in an assignment of both moieties to the Archbishop of Canterbury for securing 6000*l.* and interest. On the

(*a*) Rex v. the inhabitants of St. Michael's, Dougl. 630.
(*b*) 3 Ves. jun. 25.

death of Charles Duke of St. Albans, George Duke of St. Albans his heir at law entered on the office and received the fees. The mortgage ultimately vested in Bridget Crewys, who joined with Duke George in a surrender to the crown of the grant, and a fresh grant was afterwards obtained for the lives of George Duke of St. Albans, Charles Beauclerk, and Aubrey Beauclerk, afterwards Duke of St. Albans, and the life of the survivor in trust for Duke George, his heirs and assigns. This grant was assigned to Bridget Crewys. George Duke of St. Albans and Charles Beauclerk afterwards died, and Aubrey, then Duke of St. Albans (the only surviving life) entered and took the profits. A bill was filed by the executors of Bridget Crewys against Aubrey Duke of St. Albans, charging that as there was no other life in the grant except the Duke, the office itself was an insufficient security for the 6000*l.* and interest, and that the defendant ought to account to the plaintiffs for the fees and emoluments received by him, and for any future fees and emoluments, and that the plaintiffs ought to be let into possession; and praying an account of principal and interest, and for a foreclosure, and that a value might be set on the office, or that the office might be sold, and in case of a deficiency, the defendant might account for the fees received by him. The plaintiff demurred to so much of the bill as prayed an account of the fees and emoluments received by him anterior to the instituting of the suit, and the demurrer was allowed.

In a recent case in equity (*a*), a mortgage was

(*a*) *Ex parte* Wilson, 2 Ves. and Beames, 252.

made for 1000*l.* the property was in lease. The mortgagor became bankrupt. The mortgagee gave the tenant notice to pay the rent to him. The assignees nevertheless received the rent. The mortgagee petitioned that the assignees might be ordered to pay to the petitioner the rent received. Lord Eldon said, "that admitting the case of Moss v. Gallimore (*a*) to be sound law, he had been often surprised by the statement that the mortgagor was *receiving* the rents *for the mortgagee.* A mortgagee never could, in that court, make the mortgagor account for the rent for the time past. There was no instance that a mortgagee *per directum* had called on the mortgagor to account for the rents. The consequence is that the mortgagor does not receive the rent for the mortgagee."

This latter case carries the principle to a great extent, if it can be supposed that the assignees were aware of the notice given; for, in such case, they could hardly be considered as acting conscientiously; and they must, it is conceived, have subjected the tenant to the distress or action at common law of the mortgagee, for the amount paid to the assignees.

From the language of Lord Eldon in this case his opinion may be gathered that a mortgagor cannot be viewed in the light of *a receiver*; and, in fact a receiver without liability to account appears a contradiction in terms, it being in truth, an *ownership.*

(*a*) 1 Dougl. 288, *et vide infra.*

The Act of the 7 of Geo. II. cap. 20. claims our particular attention. That Act recites that mortgagees frequently bring actions of ejectment for the recovery of lands and estates to them mortgaged, and bring actions on bonds given by mortgagors to pay the money secured by such mortgages, and for performing the covenants therein contained, and likewise commence suits in his Majesty's Courts of Equity to foreclose their mortgagors from redeeming their estates; and the Courts of Law where such ejectments are brought, have not power to compel such mortgagees to accept the principal monies and interest due on such mortgages and costs, or to stay such mortgagees from proceeding to judgment and execution in such actions, but such mortgagors must have recourse to a Court of Equity for that purpose; in which case likewise the Courts of Equity do not give relief until the hearing of the cause, for remedy whereof it enacts, that where any action shall be brought on any bond for payment of the money secured by such mortgage or performance of the covenants therein contained, or where any action of ejectment shall be brought in any of the Courts of Record at Westminster, or in the Court of Great Sessions in Wales, or in any of the superior courts in the counties palatine of Chester, Lancaster, or Durham by any mortgagee his heirs executors administrators or assigns, for the recovery of the possession of any mortgaged lands; and no suit shall be then depending in any of his Majesty's Courts of Equity in England, for or touching the foreclosing or redeeming of such mortgaged lands, if the person having right to redeem such mortgaged lands, and

who shall appear and become defendant in such action, shall, at any time pending such action, pay unto such mortgagee or, in case of his refusal, shall bring into court where such action shall be depending, all the principal monies and interest due on such mortgage, and also all such costs as have been expended in any suit at law or in equity upon such mortgage (such money for principal, interest, and costs to be ascertained and computed by the court where such action is depending, or by the proper officer by such court to be appointed for that purpose) the monies so paid to such mortgagee or brought into such court shall be deemed and taken to be in full satisfaction and discharge of such mortgage, and the court shall and may discharge every such mortgagor or defendant of and from the same accordingly, and shall and may by rule of the same court compel such mortgagee at the costs of such mortgagor to assign surrender or recover such mortgaged lands, and such estate and interest as such mortgagee hath therein, and deliver up all the deeds evidences and writings in his custody relating to the title thereto, unto such mortgagor who shall have brought such monies into the court, his heirs executors or administrators or to such other person as he shall, for that purpose nominate or appoint. And that where any bill or suit shall be filed, commenced or brought in any Courts of Equity in England by any person having or claiming any estate right or interest in any lands, under or by virtue of any mortgage thereof to compel the defendant in such suit having or claiming a right to redeem the same to pay the plaintiff in such suit, the principal money and inte-

rest due on any such mortgage, or the principal money and interest due on such mortgage, together with any sum of money due on any incumbrance or specialty charged or chargeable on the equity of redemption thereof, and in default of payment thereof to foreclose such defendant of his right of redeeming such mortgaged lands, &c.; such Court of Equity, where such suit shall be depending, upon application made by the defendant having a right to redeem such mortgaged lands, and *upon his admitting the right and title of the plaintiff in such suit*, may and shall at any time before such suit shall be brought to hearing, make such order or decree therein as such court might have made in case such suit had then been regularly brought to hearing, and all parties to such suit shall be bound by such order or decree so made, to all intents and purposes, as if such order or decree had been made by such court at or subsequent to the hearing of such cause or suit. But it is provided, that the Act shall not extend to any case where the person against whom the redemption is prayed, shall (by writing under his hand, or the hand of his attorney, agent or solicitor, to be delivered before the money shall be brought into such court, to the attorney or solicitor for the other side,) insist either that the party praying a redemption has not a right to redeem, or *that the premises are chargeable with other or different principal sums than what appear on the face of the mortgage or shall be admitted on the other side*, nor to any case where the right of redemption to the mortgaged lands and premises in question in any cause or suit shall be controverted or questioned by or between different defendants in the

same cause or suit, nor shall be any prejudice to any subsequent mortgagee or incumbrancer.

On this beneficial statute several cases have arisen, It has been decided in equity (*a*) that if the bill embraces any object distinct from the foreclosure of the mortgage, as for example, if it sets up another demand on the defendant, and prays it may be also a charge on the estate, no order of reference can be made under the statute. Lord Eldon has remarked, that the justice of the case seems to be, that the reference should be made as to the mortgage, and the cause go on as to the rest, but he had never known it done.

The application for the reference, in equity, must be made before the mortgagee is entitled to sue out execution at law (*b*), and will not be granted, if the mortgagor is in contempt (*c*).

A Court of Law has decided, in reference to this statute (*d*), that if a mortgagor contracts to sell to the mortgagee his equity of redemption, and the mortgagee, before the completion of the contract, proceeds by ejectment to evict the mortgagor from the possession, the court will not stay the proceedings on tender of principal, interest, and costs; on the ground that the mortgagor has now no right to re-

(*a*) Bastard v. Clark, 7 Ves. jun. 489.
(*b*) Amis v. Lloyd, 3 Ves. and Beames, 16.
(*c*) Hewitt v. M'Cartney, 13 Ves. jun. 560.
(*d*) Goodtitle v. Pope, 7 Term Rep. 186.

deem, and that a Court of Equity would decree him to complete the contract. It may, however, be proper to remark, that according to another reported case (*a*), but which is not fully nor correctly stated, the mortgagee should tender a deed of conveyance to the mortgagor, or file his bill in equity for a completion of the contract as a ground for the court to reject the motion for a stay of proceedings.

In equity it has been determined that the reference to the Master under the statute, must proceed on an admission that the principal and interest, mentioned in the foreclosure bill, are due; and the master cannot admit evidence to show the contrary (*b*). In the case above alluded to, the bill was filed for foreclosure of a mortgage for 392*l.* 4*s.* 3*d.* The defendant petitioned for a reference to the Master under the statute, and stated in his petition that the principal sum due was reduced to 340*l.*, and that the interest on the mortgage had been paid up to August, 1792. The order for reference was made. The Master admitted evidence to show these facts, and reported accordingly. Two exceptions were taken to the Master's report. First, that he ought to have certified that the whole principal sum of 392*l.* 4*s.* 3*d.* was due on the mortgage, the defendant having by the decretal order admitted the fact; and secondly, that he ought to have reported, that the interest was due from the 4th of August, 1778,

(*a*) Skinner v. Stacy, 1 Wils. 80.

(*b*) Huson v. Hewson, 4 Ves. jun. 103.

up to the 18th of November, 1794, when the plaintiff took possession. In support of the exceptions it was argued, that the consequence of a reference under this statute is, that the defendant admits the principal and interest to be due. For the defendant it was urged, that under the statute the inquiry was to be made as usual. The Lord Chancellor said he did not see what answer there was to the statute, and he thought if it had been attended to, the order should not have been made. He did not know how to get rid of the objection, and allowed the exception. It appears that on being again applied to, the Lord Chancellor said that if the defendant stopped the proceedings before answer, he must take the statement of the bill to be true; if he litigated the fact, he might answer; then where he had applied to stay proceedings, when the plaintiff was aware of the objection, and had not admitted it, and had offered an issue, the court had in no instance made the order.

The time appointed for the payment of the mortgage money may be enlarged under the statute, in like manner, as if the cause was brought to a hearing (*a*), as will be hereafter noticed (*b*).

A further privilege annexed to the estate of the mortgagor has been already noticed (*c*), viz. the right,

(*a*) Wakerell v. Delight, 9 Jun.
(*b*) *Vide infra.*
(*c*) *Vide supra* page 233.

where an advowson is the subject of the mortgage, of nominating to the church on an avoidance of the living.

The foregoing are the principal privileges attached to the estate of the mortgagor during the continuance of his equitable ownership. In the next chapter we shall consider the restrictions and disabilities annexed to his estate.

CHAPTER III.

Of the Restrictions and Disabilities annexed to the Estate of the Mortgagor.

ALTHOUGH in equity the mortgagor remains the actual owner of the land until foreclosure, entitling him, while in possession, to the receipt of the rents and profits without account, yet equity, regarding the land with all its produce as a security for the mortgage debt, will restrict the right of ownership within those bounds which may not operate to the detriment or injury of the mortgagee.

On this principle equity will interfere to prevent waste by the mortgagor, and for that purpose grant an injunction on bill filed by the mortgagee (*a*).

Equity also will in no instance, it seems, interpose its authority to obstruct the mortgagee from evicting the mortgagor from the possession, but for such purpose consider the latter, a mere tenant at will (*b*).

The mortgagor is liable to eviction by the mortgagee without any notice whatever, unless protected

(*a*) Farrant v. Lovel, 3 Atk. 723, *et vide* Robinson v. Litton, *ibid.* 210.

(*b*) *Vide* Cholmondely v. Clinton, 2 Mer. 259.

by the agreement for quiet possession until default &c. (*a*), and he has no right to emblements, for all the produce of the land forms part of the security (*b*).

His possession generally speaking, being only that of tenant at will, he cannot make a lease to bind the mortgagee; and if he make such a lease, the mortgagee may proceed to eject the lessee without notice (*c*). If the land, however, at the time of the mortgage, be in the occupation of a tenant from year to year, he will be entitled to the usual notice to quit (*d*).

On the eviction of the lessee two questions arise: First, whether he is entitled to *emblements*, and secondly, whether he is liable to an action for *mesne profits*, and it seems that both questions may be answered in the negative.

First, as to emblements: the point was started in the case of Keech v. Hall, but did not call for a decision, the court only remarking that the right to emblements would be no bar to the mortgagee's recovering in ejectment; it would only give the lessee a right of ingress and egress to take the crops. It may however be considered, that both on legal and equitable principles the lessee will not be entitled to emble-

(*a*) Keech v. Hall, Dougl. 22. (*b*) *Ibid.*
(*c*) *Ibid.*
(*d*) Birch v. Wright, 7 Term Rep 383.

ments, for at law he is evicted by title paramount, and the law makes a distinction as to the right to emblements, between tenants who have particular estates that are uncertain, defeasible by the act of the parties to the original contract, or by the act of God, and those who have particular estates uncertain, defeasible by a *right paramount;* (*a*) for in the latter case, he that hath the right paramount shall have the emblements, for although *quoad actionem*, the law will not by a fiction make the lessee who comes in by title liable to punishment as a trespasser, yet *quoad proprietatem*, the regress of the disseisee revests the property as well for the emblements as for the freehold itself, and equally against the feoffee or lessee of the disseisor, as against the disseisor himself. For the rule and reason of the law is, that after the regress of the disseisee, the law adjudges that the freehold has continued in him; which rule and reason extends as well to the emblements as to the freehold, and although the act of the disseisor may alter a man's action, yet his act cannot take away his action, property, or right (*b*). On equitable principles also the lessee is not entitled to emblements, for the land and all its produce form a security for the debt; and as the creditor and lessee have equal equities, the former cannot, it should seem, be deprived of his legal rights; for where equities are equal, the law must prevail.

As to mesne profits, the legal remedy is by

(*a*) Co. Litt. 55. (*b*).
(*b*) Lifford's case, 11 Co. 51.

an action of trespass *vi et armis*, and in this respect, a distinction is taken between a disseisor and one who comes in under him by title (*a*), for if a man be disseised, and the disseisor, during the disseisin cuts down the trees, or grass, or the corn growing upon the land, and afterwards the disseisee re-enters, the desseisee shall have an action of trespass against him *vi et armis* for the trees, grass, corn, &c., for after the regress, the law, as to the disseisor and his servants, supposes the freehold always continued in the disseisee. But if the disseissor makes a feoffment in fee, gift in tail, lease for life or years, and afterwards the disseisee re-enters, he shall not have trespass *vi et armis* against those who come in by title, for this fiction of the law, that the freehold continued always in the disseisee shall not have relation to make him who comes in by a title a wrong doer *vi et armis*, because in *fictione juris semper equitas existit.* But in such case, the disseisee shall recover all the mesne profits against the disseisor. Now the lessee, coming in by title under the mortgagor in possession, appears to be within the rule, and consequently not liable to an action for mesne profits.

The mortgagor not being able by himself to make a valid lease, it follows that in order to enforce specific performance of an agreement for a lease, he must obtain a prior re-conveyance from the mortgagee, or procure the latter to concur in the lease (*b*).

(*a*) Lifford's case, *ubi supra.*

(*b*) *Vide* Costigan v. Hastler, 2 Sch. and Lef. 160.

In Costigan v. Hastler (*a*), it seems to have been considered that the tenant could not under an agreement for a lease, compel the mortgagor to redeem for the purpose of granting a valid lease, but the circumstances of that case were very special; the rent reserved was a rack rent; and, pending the suit, performance of the contract became impossible, the premises being sold by the mortgagee under an order of Court. The circumstances in that case were, that John Parker being seised in fee of the equity of redemption of some lands in mortgage, entered into an agreement to grant a lease to one Alley in trust for Hastler. The latter got into possession, and advertised the lands to be let. The plaintiffs offered a rent of 221*l.*, and were declared the tenants. A lease for three lives was prepared by Hastler, from Alley to the plaintiffs, and executed by the latter, but not by Alley, and was retained by Hastler, under pretence of procuring Alley's signature. The plaintiff entered into possession of part of the premises. Hastler subsequently distrained for rent. To prevent a sale of the distress, the plaintiffs gave three notes of hand to a trustee for Hastler, subject to a settlement of accounts; on which notes, but without a settlement of accounts, actions were brought by Hastler. The original bill was filed by the plaintiffs for relief, praying that the notes of hand might be cancelled, and Alley be obliged to execute the lease. After the filing of the bill, the mortgagee obtained a decree for sale, and the plaintiffs were put out of possession; on which they amended

(*a*) *Vide* 2 Sch. and Lef. 160.

their bill, and prayed that they might be restored to the possession, or Hastler should be ordered to pay them the value of their interest in the lands, which had considerably risen in value. The decree was; that the contract for the lease should be set aside, and the plaintiffs should account for the rent due on such part of the lands of which they had had possession during the period of their occupation, and the Master should set a fair rent on those lands, and ascertain the amount due at the time of the distress; and it was ordered that the proceedings on the notes of hand should be staid, and the actions discontinued, and the notes brought into court.

The mortgagee, as before stated, may annul the lease, or he may confirm the tenancy; and any act of the mortgagee, demonstrating an approbation of the demise, such as the receipt of or distress for rent, or the like, will be evidence of confirmation. If the mortgagee encourages the lessee to lay out money on the premises, he will not afterwards be permitted to disavow the tenancy (*a*); and even if he proceeds to evict the lessee, yet the lease being a valid demise of the equity of redemption, will entitle the lessee to redeem the mortgage (*b*), and will at all events be binding on the mortgagor and all persons claiming under him.

The mortgagor cannot dispute his mortgagee's

(*a*) Keech v. Hall, *supra*.
(*b*) *Vide* Dougl. 22.

title against his own solemn act (*a*), nor can he, while in possession, bar the mortgagee's title by fine or recovery (*b*). And if the mortgagor, being tenant in tail, mortgage his estate, and afterwards levy a fine, or suffer a recovery to other uses, it will, nevertheless, let in the mortgage (*c*).

If a mortgagor parts with his whole interest in the land, and (having consequently an equity of redemption only) joins with his mortgagee in a lease of the premises, and the lessee enters into covenants with the mortgagor and his assigns, these covenants, being collateral to the land, will neither descend at common law to the heir of the mortgagor, nor pass to an assignee of the mortgagee under the statute 32 H. 8. (*d*), but will be covenants in gross, on which actions must be brought in the name of the mortgagor or his personal representatives (*e*). In the case of Webb v. Russell, Stokes being possessed of a term of ninety-nine years, assigned to Webb by way of mortgage. Stokes and Webb joined in a demise to Russell for eleven years, at a rent of 300*l.*, payable to Stokes or his assigns; and Russell covenanted with Stokes and his assigns, to pay the rent and keep the premises in repair. Stokes afterwards purchased the reversion in fee, which was conveyed to Thackeray, in trust

(*a*) Cowper, 601.

(*b*) 1 Vent. 82. 1 Lev. 272. Hard. 402. Noy. 25. Fermor's case, 3 Co. 77. Sid. 460. Carth. 101. 2 Ves. 482.

(*c*) *Vide supra*, page 214.

(*d*) Cap. 34.

(*e*) Webb v. Russell, 3 Term. 393.

for Webb, subject to redemption by Stokes. Webb died, and appointed the plaintiff his executrix; and afterwards Thackeray conveyed the reversion to the plaintiff; so that, at law, both the term of ninety-nine years and the inheritance became vested in the plaintiff; and, consequently, the former merged in the latter. The plaintiff brought her action for breach of covenant in non-payment of rent and want of repair. The action was defended on two grounds, first, that the term of 99 years being extinguished, the assignee of the reversion on the term of 11 years was not seised of the same estate in respect of which the covenants were made, and secondly, that the covenants entered into with the mortgagor, who had no estate in the land, were collateral and in gross, there being no privity of estate between the parties. Both objections were allowed by the court to be fatal to the action. Lord Kenyon in delivering judgment stated, that at common law, covenants which run with the land pass to the person to whom the lands descend; the statute gave the grantee of the reversion the like advantages against the lessee as the grantor had, and gave the lessee the like remedies against the grantee, as he might have had against the grantor. Therefore the inquiry in this case was whether this action could have been maintained by the heir of Stokes, which was not the case, because there was no privity of estate which was necessary to make the covenants run with the land; and he fully admitted, that if they had run with the land, and had been entered into with Webb, yet the assignee could not have maintained the action, for the reversion of the term to

which the covenants were incident was extinguished in the reversion in fee.

After this decision, an action was brought against Russel for breach of covenants in the name of Stokes the mortgagor, and the court was clear, the action would lie (*a*).

(*a*) Stokes v. Russel, 3 Term Rep. 678.

CHAPTER IV.

Of the Privileges annexed to the Estate of the Mortgagee.

The mortgagee by virtue of his mortgage becomes the legal owner of the land, and consequently entitled at law to immediate possession, or to the receipt of the rent if the land be in lease. And it seems that equity will in no case interfere to prevent the mortgagee from pursuing his legal remedy to obtain possession (*a*). It is a privilege annexed to his estate as before mentioned (*b*), that he may evict the mortgagor without notice, and retain the emblements, and if the lease be granted subsequently to the mortgage without his concurrence, he may also evict the lessee of the mortgagor without notice, and retain the emblements, but he cannot, it seems, have an action for mesne profits (*c*). He may also, if the land is in lease at the time of the mortgage, give the tenant notice to pay him the rent due at the time of such notice (*d*), and may distrain for it (*e*), but it appears that if the tenant subsequently to the notice, pays the rent to the mortgagor or his assignees, the mortgagee has no re-

(*a*) *Vide* 2 Mer. 259.
(*b*) *Supra*, page 342, 3.
(*c*) *Supra*, page 345.
(*d*) Keech v. Hall, *supra*.
(*e*) *Ibid*, *supra*.

medy in equity for an account, the rule being invariable, that equity will not compel the mortgagor to account to the mortgagee for rent received (*a*).

A further privilege annexed to his estate forms an exception to the general rule of equity, that a party suing at law shall not be allowed to sue in equity at the same time; for a mortgagee may at the same time proceed by action at law on his bond and covenant, and by bill in equity for a foreclosure (*b*). But the mortgagor shall not be compelled to make payment on the bond, unless the mortgagee is in a condition to re-convey the estate, and deliver up the title, and therefore in a case (*c*), in which the mortgagee having died without any heir who could be discovered, the executor was restrained by a court of equity from proceeding at law to compel payment of the money, which was ordered to be paid into court until the heir could be found; and in another case (*d*), in which the title deeds had been lodged by the mortgagee with an attorney who claimed a lien on them, the court granted an injunction against the proceedings at law, and ordered the money to be paid into the bank, until the title deeds were secured, and a re-conveyance could be had.

The mortgagee is entitled out of the profits of the

(*a*) *Ex parte* Wilson *supra*, *et vide* Gresley v. Adderley, Swanston's Rep. Vol. I. 573.

(*b*) Burnell v. Martin, Dougl. 417. Schoole v. Sall, 1 Sch. and Lef. 176.

(*c*) Cited in Schoole v. Sall, *supra*.

(*d*) Schoole v. Sall, *supra*.

estate to repay himself all his necessary expences attending the collection of the rents (*a*), and he may stipulate with the mortgagor for the appointment of a receiver, to be paid by the latter (*b*), he may also, if the property lies dispersed, or at a distance, or is so circumstanced that the mortgagee must, if the property had been his own, have appointed a bailiff or receiver to manage it and collect the rents, appoint a bailiff or receiver of the rents without the authority of the mortgagor (*c*). It is however clearly settled, that the mortgagee shall not be allowed to make any charge for his personal trouble (*d*), nor appoint himself the receiver, even under an express agreement for that purpose with the mortgagor (*e*), for he is entitled to no benefit beyond his principal, interest and costs, besides that such an agreement might subject the mortgagor to imposition, and tend to usury, on which principle it has been decided that a mortgagee of a West India estate cannot (while resident in England at least) charge commission for his trouble, pursuant to an agreement between the parties (*f*), but it seems he may charge the usual commission on consignments made to him as a merchant, independently of any such agreement.

It is the duty of the mortgagee in possession to keep the premises in necessary repair (*g*), and he will be

(*a*) 3 Atk. 518. (*b*) Chambers v. Goldwin, 9 Ves. jun. 271.

(*c*) Bonithon v. Hockmore, 1 Vern. 316. Godfrey v. Watson, 3 Atk. 518. Davis v. Dendy, 3 Madd. 170.

(*d*) Godfrey v. Watson, *supra*. Langstaff v. Fenwick, 10 Ves. 405.

(*e*) French v. Baron, 2 Atk. 120.

(*f*) Chambers v. Goldwin, 9 Ves. jun. 274.

(*g*) Godfrey v. Watson, *supra*.

allowed the charge of permanent improvements with interest from the time of advancing the loans (*a*). In like manner he will be entitled to all his expences attending the renewal of leases (*b*), or in maintaining the title (*c*). And to prevent forfeiture for waste, he may pull down ruinous houses, and build others on their scite (*d*), and if the security be defective, he may fell timber and sell it, and apply the produce in liquidation of his debt, and will not be enjoined in equity (*e*). But a mortgagee is not bound to lay out money on the estate, except for necessary repairs (*f*), nor can he on the other hand, compel the mortgagor to advance money for the renewal of leases without an express agreement between them to that effect (*g*).

It is a further privilege of a mortgagee, that if he has been in possession for a term of seven years previously to the time of election, he may be qualified to sit in parliament, although the equity of redemption continues in another party (*h*).

If in possession he may gain a settlement under the poor laws (*i*), and will be entitled to vote for a return of members to parliament (*k*).

(*a*) *Vide* the Decree in Webb v. Rorke, *supra*, and Godfrey v. Watson, *supra*.

(*b*) Lucam v. Mertins, 1 Wils. 34. Manlove v. Bale, 2 Vern. 84.

(*c*) Godfrey v. Watson, *supra*.

(*d*) Hardy v. Reeves, 4 Ves. jun. 480.

(*e*) Witherington v. Banks, *supra*.

(*f*) 3 Atk. 518. (*g*) Manlove v. Ball, *supra*.

(*h*) 9 Ann. cap. 5. *et vide infra* page 368.

(*i*) Rex v. Inhabitants of Catherington, 3 Term. Rep. 771.

(*k*) 7 & 8 William and Mary, cap. 25. *et vide infra* page 368.

He is not estopped from denying his mortgagor's title (*a*). He is also a purchaser *pro tanto* within the 27 *Eliz.* cap. 4. so as to avoid a prior voluntary settlement under that act (*b*).

Although the mortgagee is bound to account to the mortgagor for the rents, even so far, that if after taking possession, he assigns over to another without the consent of the mortgagor (*c*), he remains liable to the account, yet he is not obliged to account according to the *actual value* of the land, nor bound by any proof that the land is worth so much, unless it can be proved that he made so much of it, or might have done without his own wilful default, as if he turned out a sufficient tenant who held it at so much rent, or refused to accept a sufficient tenant who would have given so much for it (*d*), because it is the laches of the mortgagor that he lets the lands lapse into the hands of the mortgagee by the non-payment of the money; therefore when the mortgagee enters, he is only accountable for what he actually receives, and is not bound to take the trouble of making the most of another's property. Nor can he be compelled by a purchaser to quit the possession without payment of principal, interest, and full costs (*e*).

On redemption also he is entitled to his full costs, unless deprived of them by his own misconduct (*f*).

(*a*) Cordinglee v. England, 3 Keb. 712. 54.

(*b*) Chapman v. Emery, Cowp. 278. White v. Hussey. Prec. Ch. 13.

(*c*) 1 Eq. Ca. Ab. 327.

(*d*) Anon. 1 Vern. 45. 1 Eq. Ca. Ab. 327.

(*e*) Davy v. Barker, 2 Atk. 2.

(*f*) Lomax v. Hide, 2 Vern. 185. Detillin v. Gale, 7 Ves. jun. 588. *et vide infra.*

It is laid down as clear law without contradiction, that if a mortgagor in possession levy a fine, he shall not bar the mortgagee by non-claim. This rule necessarily flows from the nature of their estates, and as well from the tenancy as from the trust and confidence between them. The cases at common law have decided that a fine levied by tenant for years, or at will, is as against the lessor and his heirs fraudulent and void (*a*), and the same doctrine is directly applied to the case of mortgagor and mortgagee (*b*). An actual entry therefore is not necessary to avoid such a fine, and even if the fine were a bar at common law, it would be void in equity (*c*) from the confidence between the parties.

Neither will a common recovery suffered by mortgagor in possession operate to bar the mortgagee, and if tenant in tail make a mortgage, and afterwards suffer a common recovery of the lands to other uses, the recovery will operate to confirm the mortgage. This subject has been already discussed in a preceding chapter when considering mortgages made by tenants in tail, and by defective conveyance (*d*).

By the 7th Anne, c. 19. reciting that many inconveniencies arise by reason that persons under the age of 21 years having estates in lands, and only in

(*a*) Fermor's case, 3 Co. 77. Focus v. Salisbury, Hard. 400.

(*b*) Freeman v. Banes, Vent. 82. 1 Lev. 272. Focus v. Salisbury, *supra*, Smith v. Pierce, Carth. 101.

(*c*) 2 Ves. 482.

(*d*) *Supra*, page 214, 215. *et vide* Porter v. Emery, 1 Ch. Rep. 97. Goddard v. Complin, 1 Ch. Ca. 119.

trust for others, or by way of mortgage, cannot convey any sure estate in such lands to any other person or persons, it is enacted that it shall be lawful for any such infants, by the direction of the Court of Chancery, or the Court of Exchequer, signified by an order made upon the hearing of all parties concerned, on the petition of the persons for whom such infants shall be seised in trust, or of the mortgagors or guardians of such infants, or persons entitled to the monies secured by or upon any lands, &c., whereof any infants are or shall be seised or possessed by way of mortgage, or of the persons entitled to the redemption thereof, to convey and assure any such lands, &c., in such manner as the Court of Chancery or the Court of Exchequer shall by such order so to be obtained, direct, to any other persons, and such conveyance or assurance so to be had or made, shall be as good and effectual in law to all intents and purposes whatsoever, as if the infants were at the time of making such conveyance or assurance of the full age of one and twenty years, and that all such infants being only trustees or mortgagees as aforesaid, shall and may be compelled by such order, so as aforesaid to be obtained, to make such conveyances or assurances as aforesaid, in like manner as trustees or mortgagees of full age are compellable to convey or assign their trust estates or mortgages.

This statute has given rise to some discussion, as well in the consideration of cases in which the infant mortgagee has had an interest in the monies secured by the mortgage, as in cases in which from the circumstances of the cases, it was requisite to have resort to a fine or recovery.

In the case of Zouch v. Parsons (*a*), a mortgagee in fee had died leaving an infant heir, and by his will had appointed his widow and the infant his co-executors and residuary legatees. On the mortgage being paid off, the infant and the widow had, without the sanction of a Court of Equity, by lease and release, granted and conveyed the mortgaged premises to certain other mortgagees in fee. The infant during his minority entered to avoid his own conveyance. The court of King's Bench expressed a decided opinion that the infant was within the statute of the 7th of Anne, and consequently would on proper application have been compellable to convey. The court also held, that the conveyance being *for the benefit* of the infant was *voidable* only, but that he could not during his minority elect to avoid, nor could any one else make the election for him. In reference to this decision lord Eldon has observed (*b*), that though it is true that where an infant conveys as a trustee within the statute, *not being so*, he will not be bound by his conveyance under such an order, yet if it is a case in which he would be bound to convey when of age, his conveyance being voidable only during his infancy, and until avoided passing the legal estate, and no one having a right to elect for him, whether it should be void or not, he would, when he became adult, be placed in such a situation, that if he sought at law to avoid his deed, a Court of Equity would prevent him. The result of the cases seems to be that if an order for the conveyance by the infant is made by the court, it is not very material, (admitting the infant to be so circumstanced, that if of age he might on bill

(*a*) 3 Burr. 1794.
(*b*) ——— v. Handcock, 17 Ves. jun. 384.

and answer be compelled to convey as a trustee) whether the case be strictly within the scope of the Act or not, for the conveyance will at law, be voidable only after the infant becomes adult, and then, if he attempts to avoid the conveyance, equity will restrain him, and grant a perpetual injunction.

The decision in Zouch v. Parsons, that a conveyance by lease and release by an infant if for his benefit is *voidable* only, and not *void*, has not however met the general approbation of the profession. The court in that case approved the distinction taken by Perkins, section 12, that such grants, gifts, and deeds of an infant as do not take effect by delivery of hand are *void*, and those which do are *voidable*, and it is thought that this rule should have prevailed in Zouch v. Parsons, and consequently that to render a conveyance by an infadt *voidable* only, it should be effected by feoffment with personal livery of seisin (*a*).

As the court will not make the order, if the case is clearly not within the statute, it becoms proper to consider, under what circumstances an infant mortgagee may now be considered as not coming within its provisions.

The questions have arisen in cases in which the infant heir has been also interested in the monies, either as executor, legatee, or next of kin.

In *Ex parte* Sergison (*b*), an infant heir was also

(*a*) *Et vide* 3 Burr. 1803. Note by the late Mr. Serjeant Hill. (2 Preston's Convey. 249.)

(*b*) 4 Ves. jun. 147.

sole executor. The Master of the Rolls considered that he could not order him to convey, because, as executor, the infant was entitled to receive the money which he could not permit an infant executor to do; and he thought they must file a bill. On a petition to the Lord Chancellor, the money was ordered to be paid into the Bank, and the Master's report confirmed, declaring the infant was not a mortgagee or trustee within the Act. The circumstances of this case, it is said (*a*), had considerable effect in producing the Act of Parliament 38 Geo. 3. c. 87, s. 6 and 7, reciting that inconveniences arise from granting probate to infants under the age of twenty-one, and enacting that where an infant is sole executor, administration with the will annexed shall be granted to the guardian of such infant, or to such other person as the spiritual court shall think fit, until such infant shall have attained the full age of twenty-one years; at which period, and not before, probate of the will shall be granted to him: such administrator to have the same powers as an administrator *durante minore ætate* of the next of kin.

In Zouch v. Parsons, the infant was as before noticed a *co-executor*, and it being a maxim of law, that one of several executors may alone give a valid discharge for a debt due to the estate, the mortgage money might have been paid to the adult executor alone. On this reasoning, the Court of King's Bench certainly grounded their opinion in Zouch v. Parsons, that the infant was in that case within the Act. In *Ex parte* Marshall (*b*), the infant was one of four resi-

(*a*) Note to *ex parte* Sergison.

(*b*) 17 Ves. jun. 383, note.

duary legatees, but not executor. The Master reported he was not a mere trustee within the Act, but the Master of the Rolls was of a different opinion, and ordered him to convey. In another case (*a*), the infant was one of the next of kin, and Lord Thurlow ordered him to convey, because the money would be paid to the administrator. In a recent case (*b*), the question arose on an objection to title; the infant being a co-executor, and one of the residuary legatees: Lord Eldon gave his opinion that payment to the other executor made the infant a trustee within the statute, and ordered him to convey. On the authority of these cases it appears to result, that if there is a hand authorized by law to receive the money, the infant will be ordered to convey, although he is one of several executors, or beneficially interested, and it may be thought that since the passing of the 38 Geo. 3. cap. 87. the case of *Ex parte* Sergison is no longer applicable in cases in which the infant heir is also sole executor.

The operation of the statute is not confined to England. Infants have been ordered to convey lands in the West Indies (*c*), at Calcutta (*d*), and in Ireland (*e*).

It was doubted by Lord Hardwicke, whether the

(*a*) 17 Ves. jun. 383, note.

(*b*) —— v. Handcock, 17 Ves. jun. 383.

(*c*) *Ex parte* Proeser, 2 B. C. C. 325. *Ex parte* Bosanquet. *Ex parte* Fenelito. *Ex parte* Osborne. All cited in 5 Ves. jun. 242.

(*d*) *Ex parte* Anderson, 5 Ves. jun. 242.

(*e*) Evelyn v. Forster, 8 Ves. jun. 96.

judges would permit an infant trustee under the statute, to suffer a common recovery, unless he procured a privy seal for that purpose (*a*); but in a subsequent case (*b*), his lordship, on considering the wording of the Act, ordered an infant trustee, being a tenant in tail, to convey by common recovery (*c*). If the infant be a feme covert, she may convey by fine (*d*). The court will also, if necessary, direct the infant to make a surrender of copyhold estates (*e*).

Inconveniences having also arisen from the consequences of mortgages passing into the hands of ideots and lunatics, the legislature has provided (*f*), that it shall be lawful for any person being ideot, lunatic, or *non compos mentis*, or for the committee or committees of such person in his or her name, by the direction of the Lord Chancellor or Lord Keeper, or Lords Commissioners of the Great Seal, by an order made upon hearing all parties concerned on the petition of the person, for whom such person being ideot, lunatic, or *non compos*, shall be seised in trust, or of the mortgagor or person entitled to the monies secured upon any lands whereof any such person being ideot, lunatic, or *non compos mentis*, is seised or possessed by way of mortgage, or of the person entitled to the redemption thereof, to convey and assure any such lands in such manner as the Lord Chancellor, Lord Keeper, or Commissioners

(*a*) *Ex parte* Bowes, 2 Atk. 164.
(*b*) *Ex parte* Johnson, *ibid*, 588.
(*c*) *Et vide ex parte* Smith, Amb. 624.
(*d*) *Ex parte* Maire, 3 Atk. 479. Anon. Com. 615.
(*e*) *Vide* 7 Term Rep. 104.
(*f*) 4 Geo. 2. cap. 10.

of the Great Seal, shall by such order so to be obtained direct, to any other person, and such conveyance or assurance so to be had and made, shall be as good and effectual in law, to all intents and purposes, as if the person being ideot, lunatic, or *non compos*, was at the time of the making of such conveyance or assurance of sane mind, memory, or understanding, and not ideot, lunatic, or *non compos mentis*, or had by him or herself executed the same. And that every such person being ideot, lunatic, or *non compos mentis*, and only trustee or mortgagee as aforesaid, or the committee of every such person, may be empowered and compelled by such order so to be obtained to make such conveyance or assurance, in like manner as trustees or mortgagees of sane memory are compellable to convey or assign their trust estates, or mortgages.

On this statute, it has been decided, that a lunatic trustee or mortgagee cannot be ordered to convey unless a commission of lunacy has previously issued, or unless he has been found lunatic by a competent jurisdiction abroad (*a*).

(*a*) *Ex parte* Otto Lewis, 1 Ves. 298. *Ex parte* Gillam, 2 Ves. jun. 587, *et vide ex parte* Marchioness of Annandale, Amb. 80.

CHAPTER V.

Of the Restrictions and Disabilities annexed to the Estate of the Mortgagee.

EQUITY having extended its protection to the estate of the mortgagor, and decided that until foreclosure, the mortgage (although in fee) is but a security for the debt, will not permit the mortgagee to take an undue advantage of the necessities of the mortgagor, or of the legal incidents accruing at common law to the estate of the mortgagee in the land. It has therefore imposed some considerable restrictions and even disabilities on the mortgagee, so long as he retains that character.

Amongst the latter may be reckoned his inability to accept a valid lease from the mortgagor, even as it should seem at a fair rent. The authority for this position is a case heard in Ireland before Lord Redesdale (*a*). The facts were, Edward Webb mortgaged to Rorke, and some years afterwards granted a lease of part of the land to Rorke for a term of 999 years at a yearly rent. A bill was filed by the heirs of Webb against the heirs and executors of Rorke charging, that the lease was made at a gross undervalue, and in consequence of threats of foreclosure, and prayed that the lease and mortgage deed might

(*a*) Webb v. Rorke, 2 Sch. & Lef. 661.

be brought into court, and the defendant might account for the real value of the lands. The answer insisted that the lands were let at a fair value and without threat. Two issues at law were directed, first, whether the lease was voluntarily granted, and secondly, whether the rent reserved was a fair rent. The jury found in the affirmative on both issues. On the cause coming on to be heard in equity, Lord Redesdale considered, he was mistaken in directing the issues at law, and decreed the lease to be set aside as contrary to the principles of public policy, and the spirit of the laws for the prevention of usurious contracts, and ordered the master to take an account of principal and interest, and as the rent did not appear fraudulent, he was to charge the defendant with such rent up to the first day of payment after filing the bill, and inquire whether the mortgagee had advanced any sums of money in permanent improvements of the land, and if so to add the same to the mortgage debt, and calculate interest thereon.

The case of Webb v. Rorke had been preceded by a case heard also before Lord Redesdale (*a*), in which a lease from a mortgagor to a mortgagee had been set aside, but in that case there were circumstances of oppression and fraud, and consequently it is not an authority for a general rule; but the case of Webb v. Rorke was free from such circumstances, and consequently if it is to stand as law, establishes the principle, that if a mortgagee accepts a lease from the mortgagor, he takes it subject to its being set aside in equity, however fair may be its provisions.

(*a*) Gubbins v. Creed, 2 Sch. & Lef. 214.

A further considerable disability annexed to his estate is, that although he is at law the actual owner, and consequently can make a good legal title, yet he cannot in equity make a valid or binding lease, unless it seems there be an absolute necessity for it. This was decided in a case (*a*) in which a mortgagor having filed his bill for a re-conveyance, the mortgagee answered that he had made a lease of the premises for 5 years at a yearly rent, with a covenant that after the expiration of the five years, the lessee might hold it for four years longer, and that if the mortgagor would grant such additional lease he would re-convey. This case being heard at the Rolls, a decree was obtained for the defendant, but on appeal, Lord Macclesfield was of opinion, that the mortgagee before foreclosure of the equity could not lease the premises for years to bind the mortgagor, unless to avoid an apparent loss, and merely on necessity, and thereupon he reversed the decree at the Rolls.

The Courts of Equity, fearful of opening a door to fraud and usury, have imposed a restriction on the mortgagee that he shall not be permitted to make any charge on the estate for his personal trouble (*b*), or appoint himself receiver of the estate (*c*), although under an express agreement with the mortgagor for that purpose. In a recent case (*d*), it became necessary to consider whether a mortgagee of a West India estate should be allowed, under an agreement to that

(*a*) Hungerford v. Clay, 9 Mod. 1.
(*b*) *Supra* page 353.
(*c*) *Ibid.*
(*d*) Chambers v. Goldwin, 9 Ves. jun. 274. *et vide supra*, page 353.

effect, to charge the usual commission for his trouble, and it was decided that he could not claim the commission, at least while in England. In a case at common law (*a*) it appeared, that a mortgage deed contained a proviso that in order the better to secure the more regular and punctual payment of the interest of the mortgage monies, the mortgagee should be in the receipt of the rents of the premises, (which were messuages in the county of Middlesex,) and should be allowed as receiver 40*l.* a year for his trouble, and after retention thereof and of the interest, should pay the residue to the mortgagor. An action *qui tam* was brought against the mortgagee for usury, and a verdict obtained by the plaintiff subject to the opinion of the court, whether the action was properly laid in London, the rent being received in Middlesex, but accounted for in London where the contract was made. The court held that the usury was not complete until the settlement of the account which took place in London, and therefore the venue was well laid.

The legislature also has imposed restrictions on the mortgagee as well in respect to his right of voting for the return of members to parliament as to his privilege of being elected. The 7 and 8 of William and Mary, c. 25, enacts that no person shall be allowed to have any vote in election of members to serve in parliament for or by reason of any trust estate or mortgage, unless such trustee or mortgagee be

(*a*) Scott v. Brest, 2 Term Rep. 238.

in actual possession or receipt of the rents and profits of the same estate, and the 9 of Anne, c. 5. provides, that no person shall be qualified to sit in the House of Commons within the meaning of the act, by virtue of any mortgage whereof the equity of redemption is in any other persons, unless the mortgagee shall have been in possession of the mortgaged premises *for seven years* before the time of his election.

A mortgagee in possession being considered by equity in some sort as a trustee of the estate, and as such accountable for the rents and profits, it behoves him to be very careful to whom he assigns his mortgage unless with the concurrence of the mortgagor, for if he assign to an insolvent person, he will be liable to account for the rents as well after as before the assignment (*a*), for it is a breach of trust in him to assign the pledge to a person insolvent.

In a modern case (*b*) an estate being already in mortgage was devised in strict settlement; the mortgagee permitted the tenant for life in possession to run the interest in arrear, and afterwards purchased the estate for life, and entered into possession and received the rents for about three years, when the tenant for life died. The plaintiff filed his bill of foreclosure against the remainder-man: and the only question which arose was, whether in taking the accounts, the plaintiff was to be charged not only for

(*a*) 1 Equ. Ca. Ab. 327.
(*b*) Lord Penrhyn v. Hughes, 5 Ves. jun. 99.

the interest accrued since his taking possession, but also with the arrears due at the time of his purchase, the defendant insisting that the surplus rents received by him after the deducting the current interest, ought to be applied in reduction of the arrears. The point was admitted to be new—for the plaintiff it was urged that to make good the defendant's claim, it must rest on the ground of lien for the arrears, which did not subsist between the tenant for life and remainder-man. For the defendant it was urged that the tenant for life was bound to keep down the interest, and the mortgagee having notice of that equity, purchased subject to it. The master of the rolls held that inasmuch as, if the mortgagee had entered in that capacity, the surplus rents must have been applied in discharge of the arrears, he should not be allowed to prejudice the rights of the reversioner by entering as a purchaser. The decree was that an account should be taken of principal, interest, and costs, and of the rents and profits received by the plaintiff, which were to be applied, first in payment of the interest, which accrued due subsequently to his entering into possession, and in the next place, so far as they would extend, in satisfaction of the preceding arrears.

In an earlier case (*a*) a term was created for raising portions out of annual profits. The mortgagee permitted the tenant for life to enjoy the estate under the usual clause, that it should be lawful for the mortgagor to take the profits until default: the court held that the rents being received by the tenant for life with the permission of the mortgagee, it was the same as if

(*a*) Ivy v. Gilbert, 2 P. Wms. 20.

the mortgagee had let the estate to any other person, and therefore the profits received by the tenant for life with the mortgagee's permission, should be considered as if received by the mortgagee himself, and be accounted for accordingly, and that he might have his remedy over against the personal representatives of the tenant for life.

From the principle before stated, that the mortgagee in possession is in some sort a trustee for the mortgagor, it results that he cannot by fine or recovery or other adverse act bar the right of redemption in the mortgagor(*a*), and if the mortgagee be disseised, and the disseisor levy a fine, and five years elapse without entry, whereby the mortgagee is barred by non claim, yet the mortgagor, on payment or tender of the mortgage money, will have five years to prosecute his claim by the second saving of the 4 Hen. 7. cap. 24. because his right did not sooner accrue(*b*).

On the like principle of trusteeship, equity holds, that if leaseholds be in the mortgage, and the mortgagee renew, he will take the renewed lease subject to the like equity as was subsisting in the old lease, even although there was only what is called a tenant right of renewal (*c*); and if an advowson be in mortgage, and the living become vacant, the mortgagor and not the mortgagee shall present (*d*), nor will equity permit the mortgagor to agree to the con-

(*a*) Welden v. Dux Ebor', 1 Vern. 132.

(*b*) Stowell v. Lord Zouch, Plowd. 373. *et vide* 1 Vern. 132, Note.

(*c*) *Supra* page 127. (*d*) *Supra* page 233.

trary (*a*), for the mortgagee shall have no benefit beyond his principal, interest, and costs.

If the mortgagee present, and his clerk be admitted, the mortgagor may by bill in equity compel him to resign, but the bill must be filed within six months after the death of the last incumbent (*b*).

A further restriction on the estate of the mortgagee is that he shall not be permitted (if in possession) to waste the estate (*c*); if he proceed to fell timber, an account will be decreed and the produce applied, first, in payment of the interest, and then in sinking the principal, and equity will enjoin him, unless the security prove defective, in which case the court will not restrain him from felling timber, the produce being of course applied in ease of the estate (*d*).

It may be almost superfluous to notice, that the mortgagee must take the estate subject to the acts of forfeiture, &c., committed by the mortgagor. If an authority for the position be requisite, the following (*e*) is in point: an estate had on marriage been limited in strict settlement on the husband *for life*, with remainder to the wife for life, with remainder to their first and other sons in tail male. The husband concealed the settlement, and with his wife conveyed to a mortgagee in fee by lease and release *and fine sur*

(*a*) *Supra* page 233.

(*b*) Gardiner v. Griffith, 2 P. Wms. 404. *Supra* page 233.

(*c*) Hanson v. Derby, 2 Vern. 392.

(*d*) Withrington v. Bankes, Sel. Ca. Ch. 31.

(*e*) Lady Whetstone v. Sainsbury, Pre. Ch. 591. *Sed vide* Willis v. Fineux, *ib.* 108.

conuzance, &c. which was a forfeiture of their life estates. The mortgage was afterwards transferred to the plaintiff, and for further assurance a second conveyance and fine were executed and levied by the husband and wife. The husband died. The plaintiff filed his bill of foreclosure against the wife and eldest son, and to be relieved against the forfeiture. The son pleaded the settlement and insisted on the forfeiture by the fine, and the court allowed the plea: but it ultimately appearing that the estates were *equitable* only, the court held the fines to be no forfeiture, and ordered that the mortgagee should hold during the widow's life (*a*).

It is a restriction also on the estate of the mortgagee, that he cannot compel the mortgagor to account for the past rents and profits. This matter has been already treated of (*b*): and in addition to the preceding remarks may be here noticed a very recent case (*c*), the circumstances of which were, that a term of 100 years created to raise children's portions had been assigned by the trustees by way of mortgage; the money was permitted to remain on the estate for many years. Under certain proceedings in chancery distinct from the mortgage, a receiver had been appointed, and the surplus rents paid into court. Part of the money was due when the term expired by effluxion of time; the mortgagees applied to the court to be paid the remaining debt out of the fund in court, but without success.

(*a*) 2 P. Wms. 146. (*b*) *Supra* page 332.
(*c*) Greasley v. Adderley, 1 Swanston, 573.

END OF BOOK THE THIRD.

A

TREATISE

ON

THE LAW

OF

MORTGAGE.

BY

RICHARD HOLMES COOTE,

OF LINCOLN'S INN, ESQ. BARRISTER AT LAW.

PART THE SECOND;

WITH PRECEDENTS AND INDEXES.

London:

PRINTED

FOR JOSEPH BUTTERWORTH AND SON, LAW-BOOKSELLERS,

NO. 43, FLEET STREET;

AND J. COOKE, ORMOND QUAY, DUBLIN.

1823.

G. WOODFALL, PRINTER, ANGEL COURT, SKINNER STREET, LONDON.

PREFACE.

In bringing the present Treatise to a close, the Author is naturally anxious to address a few words in its behalf to the Public. He was induced to the undertaking by the general impression that a modern Work on the Law of Mortgage was wanting, and from his not being aware that any other gentleman was disposed to the task. Its appearance in Parts was a subject of regret to the Author, but circumstances, over which he had no control, rendered it unavoidable. Since the publication of the First Part, another Treatise on the same Subject has been published, as also a new edition of Mr. Powell's Treatise on Mortgages, with Notes. Had the Author been aware that any other Work on the same subject was in progress, he would readily have relinquished his engagement; but he was not acquainted with the fact, until it was too late for him to recede.

In reference to his own performance, he trusts he has been cautious in not drawing conclusions unwarranted by the authorities; he has been anxiously desirous, to the best of his abilities, in no instance to mislead his Readers.

The compilation of a Law Treatise has, from the number of our Reports, become a work of considerable labor: and in traversing so wide a field of inquiry as is presented on a re-

view of the Law on Mortgage, errors will unavoidably arise, and many defects occur; but the Author has the satisfaction of knowing that those, who from their learning and talents, are best enabled to form a judgment of his Work, will be the most inclined duly to appreciate its difficulties, and to make every candid allowance for its imperfections.

In conclusion, the Author hopes his efforts may, in some degree, prove useful to the Profession, and that he has not fruitlessly expended so much time and labor as have been devoted to the accomplishment of the present Work.

Lincoln's Inn,
Michaelmas Term, 1822.

CONTENTS

OF

PART THE SECOND.

BOOK IV. Page

CHAP. I. Of Notice 373

BOOK V.

CHAP. I. Of Tacking, and Priority of Incumbrances 391

—— II. Of Interest 432

—— III. Out of what Fund the Mortgage debt shall be discharged 457

—— IV. Of Foreclosure 510

—— V. To whom the Money and Lands in mortgage will belong 529

BOOK VI.

CHAP. I. Of the Right of Redeeming 535

—— II. Of Accounting 555

—— III. Of Purchasing Incumbrances 562

—— IV. Of Devises and Bequests of Mortgages 566

MISCELLANEOUS CHAPTER 592

PRECEDENTS 601

NAMES OF CASES 619

INDEX 653

NOTE.

THE AUTHOR has to apologize for an accidental omission in a few of the early copies sold of the First Part, at the bottom of page 48, which *ought* to conclude with the words "the latter being the creature of." As the mistake was immediately rectified in the remaining copies, and has been also corrected in several of the copies sold, by the insertion of a fresh page, it is hoped there are very few, if any, copies in which the error now exists. But if there are any such, the purchasers are requested to apply at the Publisher's, and the error will be remedied.

ADDENDA.

Page 203, Note *, after the word "Eldon," add "decided that neither party nor both together had an equitable mortgage (*Ex-parte* Pearse and Protheroe, 1 Buck. 525.), but it must be observed, that from the report it seems the title-deeds were delivered to A. for the purpose of preparing a mortgage, which somewhat alters the features of the case, yet see the observations of Lord Eldon on the point in the text."

Page 206, note (*a*) add "*Ex-parte* Sikes, 1 Buck. 349."

Page 212, add "In the Autumn Assizes for 1821, an ejectment was brought (by direction of the Vice Chancellor) on the demise of Fenwick *v.* Reed, and a verdict obtained for the plaintiff. On the 9th of November, 1821, Serjeant Hullock moved the Court of King's Bench for a new trial, which was refused. 5 Barnewall and Alderson, 232.

Page 324, add "In the last Session of Parliament an Act (3 Geo. IV. c. 117.) was passed intituled 'An Act to reduce the stamp duties on reconveyances of mortgages, and in certain other cases; and to amend an Act of the last Session of Parliament for removing doubts as to the amount of certain stamp duties in Great Britain and Ireland:' by the second section of which it is enacted, that on *any* transfer or assignment of mortgage, the common deed stamp only shall be payable, and that if any further sum of money be added, the mortgage duty shall be paid only in respect of such additional sum. The preceding observations therefore on the Act of the 55 Geo. III. c. 184. are no longer applicable. By the third section of the new Act it is provided, that if any deed already or hereafter made as a further security for any sum secured by bond shall have paid the *ad valorem* duty on bonds, such deed shall be and shall be deemed *to have been* exempt from the mortgage duty, and be chargeable with the ordinary duty on deeds only. It will be seen that the latter clause is *declaratory* of the law, and, consequently, that any duties paid on mortgage deeds for sums of money, which had already paid the duty on bonds, have been wrongfully paid."

Page 327, note (*a*) add "Partridge *v.* Bere, 5 Barnewall and Alderson, 604."

Page 348, note (*b*) add "Hall *v.* Surtees, 5 Barnewall and Alderson, 687."

Page 351, note (*a*) add "Williams *v.* Medlicott, 6 Price, 496."

Page 356, note (*c*) add "Hall *v.* Surtees, *supra*."

ERRATA.

Page 46, line 16, for "devisable," read "divisible."
101, 25, dele "yearly."
169, after end of note (*f*) for "*infra*" read "*supra*."
259, line 19, for "the" read "this."
277, for "7 and 8 W. III. c. 21." read "7 and 8 W. III. c. 22."
354, note (*a*) after the word "Ronke," for "*supra*," read "*infra*, page 364."
359, line 18, for "infadt," read "infant."
370, 21, after the word "be," dele "the."
433, two lines from the bottom, for "such," read "sum of."
443, line 11, for "mortgagees," read "mortgagors."
551, 11, dele "general;" note (*a*) dele "*contra*," add "*vide* page 590."

BOOK THE FOURTH.

CHAPTER I.

Of Notice.

The doctrine of notice so materially affects the remaining part of our subject, that it will be requisite to direct our attention to it before we proceed farther in our inquiry; but the rules governing this branch of jurisprudence have been so fully laid down in a modern publication (*a*), as to render unnecessary a very minute consideration of them.

Notice is express or implied; to which may be added, a third sort of notice, *viz.* notice by statutory enactment, which does not come within either of the first mentioned species; for express notice is an actual knowledge of a given fact, regularly and formally communicated; and implied notice is a conclusion of law from violent presumption, which the courts will not allow to be controverted: but the third species arises neither from actual knowledge nor from legal presumption, but, on the con-

(*a*) Sugden's Vendors and Purchasers.

trary, would not be classed within either of those species, and is therefore made notice by legislative enactment. Of this, an instance is to be found in the case of the striking of a docket of bankruptcy, which of itself was, by the 46 Geo. 3. cap. 135, made notice of a prior act of bankruptcy, but which, independent of the statute, was not notice, either express or by implication, and which, since the repeal of the enactment, is no longer notice.

If a party having notice convey, for a valuable consideration, to one who has not notice, or if a party not having notice convey to one who has notice, the party taking the conveyance will not, in either case, be affected by the notice; for, in the first instance, he may defend himself by his own want of notice (*a*), and, in the second instance, by the want of notice in the party through whom he claims (*b*). And therefore, if *A.*, having notice, sells to *B.*, who has not notice, who sells to *C.*, who has notice, *B.* is protected against the notice in *A.* by his own want of notice, and *C.* is defended by the want of notice in *B.* (*c*).

It is however laid down in Bacon's Abridgement (*d*), on the authority of a case in Vernon (*e*),

(*a*) Mertins v. Jolliffe, Amb. 313. Ferrars v. Cherry, 2 Vern. 384.

(*b*) Harrison v. Forth, Pre. Ch. 51. 1 Eq. Ca. Ab. 331. Sweet v. Southcote, 2 B. C. C. 66. Andrew v. Wrigley, 4 B. C. C. 125. M'Queen v. Farquhar, 11 Ves. Jun. 478.

(*c*) Lowther v. Carlton, 2 Atk. 139.

(*d*) 5 Vol. 76.

(*e*) Walley v. Walley, 1 Vern. 484.

that if one take a mortgage by assignment from a mortgagee affected with notice of an outstanding title, he will take subject to that title; for his assignor cannot transfer to him a better title than he has himself; and if such original mortgagee, in a bill filed by the person setting up an eigne title against the mortgagee and his assignee, and praying to be let into possession, and charging notice, confess by his answer that he had notice before the lending of the money, that confession of notice will bind his assignee; for though the mortgagee's answer cannot be read against the assignee as evidence, yet he must stand in his assignor's place, and his assignor's confession of notice will bind him. In this doctrine Mr. Powell acquiesces (*a*), and in support of it cites the case of Lord Pomfret v. Lord Windsor (*b*), in which an estate, which was vested in trustees for raising a specific sum, was afterwards mortgaged with notice of that charge, and then a subsequent mortgage was made to one who had notice of the prior mortgage, but not of the antecedent charge, the Court held, the last mortgagee must take subject to the first charge. It is, however, submitted, that the case is not in point; for as the legal estate was outstanding, all the charges were alike equitable, and the question of notice did not, in fact, arise, and the reasoning of the Court on the point of notice, (so far as it went,) proceeded on a very different ground, viz. that as the persons having the equitable charge had a right to compel the

(*a*) Powell on Mortgages, Vol. 2. 601. 4th Edit.
(*b*) 2 Ves. 185.

first mortgagee who had notice of it to redeem them, then the first mortgagee obtaining the legal estate from the trustees, would have a right to compel the second mortgagee to redeem both charges, or be foreclosed. Of this there could be no question; but to have rendered the case applicable to the point under discussion, the second mortgagee should have obtained an actual conveyance of the legal estate from the first mortgagee, and then, having the legal estate to protect himself, and having equal equity with the prior equitable incumbrancer, the question would have been fairly raised, whether, standing in the place of the first mortgagee *quoad* the legal estate, he was bound by the notice which his assignor had. To have decided this question in the affirmative, would apparently have been in contradiction to the well-known equitable maxim, that, where equities are equal, the legal estate shall prevail, on which the doctrine of tacking, hereafter discussed, is chiefly grounded, and in opposition to many well-considered cases in which that doctrine has been applied.

A doubt, however, of a somewhat similar nature is said to have been thrown out by Lord Eldon in the case of Mackreth v. Symmons (*a*) before alluded to. In that case, Lord Eldon is reported to have put this question, whether there was any case in which a third mortgagee had excluded the second, if the first mortgagee, when he conveyed to the

(*a*) 15 Ves. Jun. 335.

third, knew of the second. His lordship remarked, when the case of Maundrell v. Maundrell (*a*) was before him, he looked for, but could not find such a case, viz. that where there was bad faith on the part of the first mortgagee, that equity was applied. It is reported, that Sir Samuel Romilly answered, he did not believe that was ever decided, and there would be great difficulty in deciding it in favor of the third mortgagee who puts himself in the place of the first. We shall, however, hereafter see, that a third mortgagee is allowed to tack *pendente lite*, even after a bill filed by a second mortgagee against the first and third mortgagees; and in which, consequently, the first mortgagee must have had notice of the second mortgage at the time of the assignment; and it may be thought that the reporter was mistaken in the doubt suggested by Lord Eldon; and that the general rule before referred to, viz. that, where equities are equal, the legal estate shall prevail, will also apply to the point under consideration.

If there be fraud in the original creation of the mortgage, as, for example, if no money actually pass between the parties, and if the mortgagee afterwards assign to a third person for a valuable consideration without notice of the fraud in the original transaction, and the mortgagor convey his equitable interest to a stranger for a valuable consideration without notice of the mortgage, the money paid on the assignment will make good the original transaction and purge the fraud (*b*).

(*a*) 10 Ves. Jun. 246

(*b*) Andrew Newport's Case, Ca. Temp. Holt, 477. Skin. 423.

In reference to the doctrine of express notice, equity does not require a party to take notice of vague rumours proceeding from strangers to the estate (*a*); and it is expected that the notice shall be made with some degree of precision as to the nature of the supposed right, and not consist of a mere general and undefined claim (*b*); but whether the notice be express, or rest on rumour or on general claim, a purchaser or mortgagee can never be advised to disregard it, or to accept the title without an inquiry into the nature of the demand (*c*).

It is difficult to lay down general rules as to what will or will not be constructive notice; but it is an established principle, that whatever is sufficient to put a party upon an inquiry is good notice in equity (*d*). As for example, if a person is aware that the legal estate is in a third person, he is bound to take notice what the trust is (*e*), for it is his duty to make that inquiry of the trustees. On the same principle, it is held, that notice of the land being in tenancy is notice of the nature of the interest of the tenant in the land, as of a lease, although the purchaser or mortgagee considered the tenant to be tenant only from

(*a*) Wildgoose v. Wayland, Goulds. 147.

(*b*) Jolland v. Stainbridge, 3 Ves. Jun. 478.

(*c*) See Fry v. Porter, 1 Mod. 311. Butcher v. Stapeley, 1 Vern. 363.

(*d*) Smith v. Lowe, 1 Atk. 490. Anon, 2 Freem. 137. Pl. 171. Taylor v. Stibbert, 2 Ves. Jun. 437. Willoughby v. Willoughby, 1 Term Rep. 769. Hall v. Smith, 14 Ves. 426. Hiern v. Mill, 13 Ves. 114. Daniels v. Davison, 16 Ves. 249. 17 Ves. 433.

(*e*) Anon. 2 Freem. 173. Pl. 171.

year to year (*a*), but it must be observed, that, if the lease be invalid, the point of notice cannot prevent an ejectment at law (*b*). A purchaser or mortgagee will be considered to have notice of a contract entered into by the tenant to become the purchaser of the freehold, although he had no intimation of the fact (*c*), and equity will enforce specific performance against the vendor and second purchaser, and leave them to settle the question between themselves (*d*). The same doctrine has subsequently been applied to the tenant's right to the timber, although accruing by a title posterior to that on which his right to the possession was grounded (*e*). But if a lease be made of charity lands, which is set aside as improvident, it seems a *bona fide* purchaser of a sub-lease will not be supposed to have notice of that fact (*f*), which depends on a number of extraneous circumstances. Notice, that the title-deeds are in the possession of a third person may, under the circumstances, be sufficient to set a purchaser upon inquiry to ascertain what lien the party holding has on the estate (*g*).

It is immaterial whether the notice be given to the party himself, or to his counsel, attorney, or

(*a*) 2 Ves. Jun. 440. 13 Ves. 120. Hall v. Smith, 14 Ves. 426.

(*b*) Doe v. Lufkin, 4 East, 221.

(*c*) Daniels v. Davison, 16 Ves. 249. Crofton v. Ormsby, 2 Sch. and Lef. 583.

(*d*) 16 Ves. 249. 17 Ves. 433.

(*e*) Allen v. Anthony, 1 Mer. 282.

(*f*) Attorney General v. Backhouse, 17 Ves. Jun. 283.

(*g*) Hiern v. Mill, *supra*.

agent (*a*); and consequently, if the same attorney be employed by both parties, the purchaser, or mortgagee, will be affected by the knowledge obtained by the vendor's or mortgagor's solicitor (*b*), even although the sale was made under the direction of the Court of Chancery, and the purchase was made by trustees on behalf of an infant (*c*); but the notice must be *in re gestâ*, even in the case of one solicitor being employed by both parties (*d*).

In the publication before alluded to (*e*), a case of constructive notice is put, in the instance of notice to the town agent of the country attorney of the purchaser or mortgagee, which, it is said, is notice to the principal; and for this, the case of Norris v. Le Neve, heard before Lord Hardwicke, is cited (*f*). There may be no question as to the doctrine; but the facts in that case are not exactly in point. It is rather an authority, that if the country attorney have notice of a fact, but employ a town agent to conduct the suit, the notice will attach to the parties, although the town agent be without actual notice. In the case in question, Martin, the country attorney, had notice; but he swore that he was employed as attorney in the ejectment at law which was tried in the country, and not as the solicitor in the suit in equity which was conducted by his town agent. The

(*a*) Le Neve v. Le Neve, 3 Atk. 646. Brotherton v. Hatt, 2 Vern. 574.

(*b*) Le Neve v. Le Neve, *supra*.

(*c*) Joulmin v. Steere, 3 Mer. 210.

(*d*) Mountford v. Scott, 3 Madd. 34.

(*e*) Sugden's Vendors and Purchasers, 639. 5th Edition.

(*f*) 6 Atk. 26.

Lord Chancellor declared, he would consider him as solicitor notwithstanding he lived in the country, for every body knew that country attornies acted by agents in causes in town.

If the counsel, &c. having notice be employed in part only of the transaction, the purchaser will be equally affected (*a*).

It is held, that if a party cannot make out his title except by a deed which by recital refers to other facts or deeds, he will be considered conusant of such other facts or deeds (*b*), and if he has notice of a deed, he has notice of all its contents (*c*). In reference to which Lord Redesdale has taken the following distinctions (*d*):—If a man purchase an estate under a deed, which happens to relate also to other lands not comprized in that purchase, and afterwards purchase the other lands to which an apparent title is made independent of that deed, the former notice of the deed will not of itself affect him in the second transaction; for he was not bound to carry in his recollection those parts of a deed which had no relation to the particular purchase he was then about, nor to take notice of more of the deed than affected his then purchase. But if a man agree to purchase under limitations in a deed, which make it necessary upon that transaction to look into that deed, and

(*a*) Bury v. Bury. See Appendix to Sugden's Vendors and Purchasers. 5th Edition.

(*b*) Hamilton v. Royce, 2 Sch. and Lef. 315.

(*c*) *Ibid. et vide* Coppin v. Fernyhough, 2 B. C. C. 291.

(*d*) 2 Sch. and Lef. 327.

that deed contains recitals of judgments affecting the lands he has so agreed to purchase, he is bound by those judgments; for he had a right to see the whole deed under which he purchased, and, therefore, must be taken to have seen the whole, and consequently be presumed to have notice of every thing in it affecting his purchase. And in the same case his lordship carried the doctrine of notice so far as to hold that if *A.* seized of Whiteacre in fee, confesses judgments, and settles that estate in consideration of a conveyance to him of Blackacre in fee, on which Blackacre in equity becomes liable to indemnify Whiteacre against the judgments, a purchaser of Blackacre with notice of deeds which recite the judgments will be bound by the equity. On this latter doctrine it has been remarked (*a*), that it carries the rule much further, it is apprehended, than is warranted either by principle or authority. But it seems to follow as a corollary from the rules laid down, that the purchaser of Blackacre must be bound by the equitable lien arising from facts stated in deeds of which he had express notice.

On the like principle it seems that if a husband who has not performed his part of marriage articles assign his wife's fortune, which was the consideration for the proposed settlement by him, the purchaser (with notice of the contract) will be bound by the same equity as the husband was (*b*); the consequence of which is, that if the husband take the wife's estate

(*a*) Sugden's Vendors and Purchasers, 653. 5th Edition.

(*b*) Harvey v. Ashley, cited in 2 Sch. and Lef. 328.

under a settlement, and it is noticed in the conveyance to the husband that it is made in consideration of a provision to be made by him, a purchaser or mortgagee must inquire into the nature of the provision, and whether it has been completed (*a*).

If an appointment be made by a father under a power to appoint the estate to one or more of his children, to one of his sons in fee, and a conveyance be afterwards executed by father and son in consideration of a sum of money stated in the purchase deed to be paid to both, although the contract was entered into by the father alone before the appointment to the son, the purchaser will not be affected with notice of fraud in the absence of all evidence to shew that the son was not to receive a due proportion of the purchase money (*b*); to the application of which the purchaser is not bound to look.

The registration of a deed is not of itself notice (*c*); and, consequently, if a mortgagee, having the legal estate, under a deed duly registered, make further advances, he will have preference over an intermediate incumbrancer or purchaser, of whose title he has not notice, although the intermediate deed of sale or charge be duly registered (*d*); and if a subsequent mortgagee obtain the legal estate, he will have preference over a prior equitable incumbrancer duly re-

(*a*) *Et vide* Mitford v. Mitford, 9 Ves. Jun. 87.

(*b*) M'Queen v. Farquhar, 11 Ves. Jun. 467. 17 Ves. Jun. 293.

(*c*) Bedford v. Backhouse, 2 Eq. Ca. Ab. 615. Pl. 12. Wrighton v. Hudson, 2 Eq. Ca. Ab. 609.

(*d*) *Ibid.*

gistered, of which he had not notice (*a*). This latter position has been much animadverted upon and questioned in a modern publication, to whose author the profession is considerably indebted (*b*); it being there considered as hardly reconcileable with the general principles of equity, and as tending to perjury. Besides, it is urged, that the prior mortgagee has no means of acquainting the subsequent incumbrancer with his charge, but the latter has it in his power to ascertain whether the estate is incumbered, and, therefore, it is his own neglect not to ascertain that there was a prior charge. To these observations it may be replied, that, as to the general principles of equity, the rule is inflexible, that, where equities are equal, the legal estate shall prevail; and that equity has made no distinction between cases in which the legal estate is vested in a purchaser or incumbrancer prior or subsequently to the other conveyance; the simple question being, whether the equities are equal, for, if so, the rule must prevail; and it being decided, that registration of itself is not notice in cases in which the legal estate is, previously to making the subsequent charge, vested in the mortgagee, it would follow that the legal estate must be a protection, although subsequently acquired. The objection, that this doctrine tends to perjury, applies strongly to both cases; for it is a great temptation to a party having the legal estate, and making further advances, to deny notice, although he has searched the register. As to the remark, that one party has it in his power to ascertain whether the estate is

(*a*) Morecock v. Dickens, Amb. 678.

(*b*) Sugd. Vendors and Purchasers, 608. 5th Edition.

incumbered, but the other party cannot give express notice of his charge; it may be replied, that it is the folly of a purchaser or mortgagee to advance his money without having previously ascertained whether the legal estate be outstanding or not; and if the legal estate is shewn to be outstanding, it is his business to get it in, or give proper notice of his incumbrance. If he neglect so to do, he takes the consequences:—*Vigilantibus non dormientibus jura subveniunt.* In the principal case under discussion, Morecock had been guilty of gross negligence, almost amounting to fraud, in allowing the mortgagor to retain the possession of a lease which he afterwards delivered up to Dickens; so that, independent of Dickens's legal right, Morecock had no claim to the assistance of equity.

The reasoning of Lord Redesdale on the consequences of a contrary doctrine, is forcible and decisive. The question before him was (*a*), whether marriage articles, duly registered, amounted to notice. After remarking the difference between the Registry Acts of England and the Registry Act of Ireland (*b*), the latter of which declares that every deed shall be effectual *according to the priority of time of registering the memorial,* and stating that he thought the registry was not notice, but had, nevertheless, the effect of giving priority except in the case of fraud, as when the party has notice *aliunde;* he remarked, "It is true, the registry is considered as notice to a certain extent; no person thinks

(*a*) Bushell v. Bushell, 1 Sch. and Lef. 103.
(*b*) 6 Ann. C. 2.

of purchasing an estate without searching the registry; and, if he searches, he has notice; but I think it cannot be notice to all intents, on account of the mischiefs that would arise from such a decision. For if it is to be taken as constructive notice, it must be taken as notice of every thing that is contained in the memorial; if a memorial contains a recital of another instrument, it is notice of that instrument; if of a fact, it is notice of that fact." His lordship ultimately determined the plaintiffs were entitled to have the benefit of the articles against persons claiming by virtue of a subsequent legal settlement, under the peculiar wording of the Act. In a subsequent case (*a*), in which he decided that the Irish Registry Act would not permit tacking, he observed, "That the registry is to be considered as notice to all intents and purposes, is, I think, what one would not be inclined to hold when one sees the effect of so considering it; if it is to be considered as notice because it is an intimation of the existence of a deed put upon record, it must be notice of every thing in that deed, for a party would be bound to inquire after the contents of that deed; if it be notice, it must be notice whether the deed be duly registered or not; it may be unduly registered; and if it be so, the act does not give a preference: and thus this construction would avoid all the provisions in the act for complying with its requisites." And in another case (*b*), he observed, "that it seemed to him that nothing could be more mischievous than to hold that the putting any

(*a*) Latouche v. Lord Dunsany, 1 Sch. and Lef. 157.

(*b*) Underwood v. Lord Courtown, 2 Sch. and Lef. 64.

thing on the registry is notice within the meaning of the word notice as applied to Courts of Equity in such cases." To meet the remark so powerfully made by Lord Redesdale, viz. that if the register of itself were notice, it would be notice although the deed were unduly registered, it has been observed (*a*), that the courts might hold that the register should not be notice unless the deed were duly registered. To such a construction there appears to be no parallel; and it would be repugnant to the general principles regulating the application of the law of notice, if equity could hold the mere act of registration to be of itself notice in favor of an equitable incumbrancer, but should consider the want of form in that act sufficient to prevent the notice. It is submitted, that it may be considered as law, both on authority and principle, that the mere registration of a deed will not of itself be notice in any case.

It is decided, that a registered deed shall not prevail against an unregistered deed, of which the party registering had notice. The cases are clear on this point (*b*), and, indeed, result from the principle on which the law of notice itself is founded. It has, however, been justly remarked (*c*), that in this case the statute must have operation at law, so as to vest the estate in the subsequent purchaser, but subject to the relief which will be granted in equity.

(*a*) Sugd. Vendors and Purchasers.

(*b*) Lord Forbes v. Deniston, 1 Ves. 67. 2 B. P. C. 425. Blades v. Blades, 1 Eq. Ca. Ab. 358. Hine v. Dodd, 2 Atk. 275. Le Neve v. Le Neve, 3 Atk. 652. Bushell v. Bushell, *supra*. Biddulph v. St. John, 2 Sch. and Lef. 521.

(*c*) Sugd. Vendors and Purchasers, 612. 5th Edition.

An act of bankruptcy is not notice (*a*), nor is it clear that a commission of bankruptcy is notice by the general law of the land (*b*); but to parties seeking relief under the 46 Geo. III. cap. 135., both the commission and the striking of the docket were made notice: the latter, however, has been subsequently repealed by the 49 Geo. III. cap. 121. sec. 1.

The docketing of judgments is not of itself notice (*c*); on the other hand, if a party have notice of a judgment not duly docketed, he will in equity be bound by it (*d*).

A decree is not constructive notice after the determination of the suit, to persons not parties to it (*e*). But a purchaser *pendente lite*, although for a valuable consideration, and without notice, will be bound by the decree (*f*), if there has been a close and continued prosecution of the suit (*g*). He will be also bound by an interlocutory decree, or decree to account (*h*).

(*a*) Collett v. De Gols, For. 70. Wilkes v. Bodington, 2 Vern. 599.

(*b*) *Sed quære; et vide* Hovell v. Browning, 7 East, 161. Hitchcock v. Sedgwick, 2 Vern. 156. Collett v. De Gols, *supra*. *Ex parte* Knott, 11 Ves. Jun. 609. *Ex parte* Herbert, 13 Ves. Jun. 183. *et infra*.

(*c*) 2 Eq. Ca. Ab. 682. note.

(*d*) Davis v. Earl of Strathmore, 16 Ves. 419.

(*e*) Worsley v. Earl of Scarborough, 3 Atk. 392.

(*f*) Worsley v. Lord Scarborough, *supra*. Sorrel v. Carpenter, 2 P. Wms. 482. Walker v. Smallwood, Amb. 676. *Et vide* Herbert's case, 3 P. Wms. 116. Garth v. Ward, 2 Atk. 175.

(*g*) Preston v. Tubbin, 1 Vern. 286.

(*h*) Worsley v. Earl of Scarborough, *supra*.

In a case heard before Lord Chancellor Cowper (*a*), it was decided, that if a first mortgagee be a witness to the second mortgage deed, it is sufficient notice to bind him, although it does not appear that he actually knew the contents; on the ground, that since it did not appear but that he might have known them, it would be presumed that every witness who could write or read was acquainted with the substance of the deed or instrument which he, having attested, undertook to support by his evidence. To this the reporter adds a quære, whether the bare attesting a subsequent incumbrance, without other circumstances of presumptive notice, will postpone a prior incumbrance; since at that rate, he adds, a prior mortgagee or incumbrancer may, without any frand or ill intention on his part, be liable to be cheated out of his security. "*And so I find it said by Lord King in our author's report of an anonymous case in Mich.* 1732." The learned editor also, in a note, admits that none of the cases seem to come up to this point: and Lord Thurlow, in Becket v. Cordley (*b*), intimated, that he should have decided differently; for a witness, in practice, is not privy to the contents of the deed. The better opinion in the present day appears to be, that the bare attestation of a deed will not, without other circumstances, be sufficient to bind a party with notice of its contents (*c*).

(*a*) Mocatta v. Murgatroyd, 1 P. Wms. 393.

(*b*) 1 B. C. C. 357.

(*c*) Fonb. Eq. Vol. 1. 165. 5th Edit. Sugd. Vendors and Purchasers, 654. 5th Edition.

It is material to bear in mind, that a mortgagee obtaining a conveyance of the legal estate, or other security, subsequently to the date of his mortgage, will not be affected by an intermediate incumbrance, if he had not notice at the time of the completion of his mortgage, notwithstanding he may have notice in the intermediate time (*a*). On the other hand, the notice will be binding on him at any time prior to the completion of his mortgage (*b*), although, as it seems, he has advanced part or the whole of the money (*c*), or given a bond, &c. for the payment of it, and at law he would have no remedy in an action against him on the bond, but he would have relief in equity (*d*).

For the mode of pleading a purchase for a valuable consideration without notice as a bar to discovery or relief, the reader is referred to other works which treat on this subject (*e*).

(*a*) See Wortley v. Birkhead, 2 Ves. 573; *et supra*, 239.

(*b*) Tourville v. Naish, 3 P. Wms. 307. Story v. Lord Windsor, 2 Atk. 630. Hardingham v. Nichols, 3 Atk. 304.

(*c*) Tourville v. Naish, *supra*. Wigg v. Wigg, 1 Atk. 382. 3 P. Wms. 307. note; *et vide supra*, 239. *Sed vide* Hill v. Bickersdike, 12 May, 1801, Exch. cited in 2 Fonb. 149. 5th Edit.

(*d*) Tourville v. Naish, *supra*.

(*e*) Mitford on Pleading. Sugd. Vendors and Purchasers, &c.

BOOK THE FIFTH.

CHAPTER I.

Of Tacking, and Priority of Incumbrances.

The doctrine of tacking is founded on an application of the equitable maxims,—that he who seeks equity, shall do equity to the person from whom he requires it (*a*);—and where equities are equal, the law shall prevail (*b*).

It has been already remarked, that equity regards the debt as the principal—the land, as the pledge: and, although the land is absolutely forfeited at law, compels the mortgagee to permit his debtor to redeem; but, in so doing, it adheres to the first mentioned rule, viz. he who seeks equity, shall do equity to him from whom he requires it; and, therefore, the Court will make terms with the debtor, before it will permit him to redeem, in order that full justice may be done the creditor.

It is equity, that the debtor shall, before redemption, pay, not merely the principal and interest of the debt, but all costs necessarily incurred by the

(*a*) Francis's Maxims, 1. (*b*) *Ibid.* 14.

creditor in maintaining the title to the estate (*a*), renewing leases (*b*), making necessary repairs (*c*), or permanent improvements (*d*). And the court will award interest on the sums from the time of their being advanced (*e*). The mortgagor, on redemption, must also pay the costs of all persons claiming under the mortgagee, although the mortgage be carried by the mortgagee into settlement (*f*); and the mortgagee will be allowed the costs of taking out administration to the mortgagor, as principal creditor (*g*), or to an incumbrancer under the will of the mortgagor, as a necessary party to foreclosure (*h*). If however the costs incurred are altogether irrelevant to the mortgage, they will not be allowed; thus in a case (*i*) in which a devisee of a mortgagee filed his bill against the heir and executor of the mortgagor for foreclosure, and also against the heir at law of the mortgagee for establishing the will, the Master of the Rolls ordered, that the plaintiff should pay the heir of the mortgagee his costs, and that he should not be entitled to have them from the estate (*k*). A distinction will, of course, be drawn

(*a*) Godfrey v. Watson, 3 Atk. 518.

(*b*) Lucam v. Mertins, 1 Wils. 34. Manlove v. Ball, 2 Vern. 84.

(*c*) Hardy v. Reeves, 4 Ves. Jun. 480.

(*d*) *Vide* the Decree in Webb v. Rooke, *supra*; and Godfrey v. Watson, *supra*.

(*e*) Godfrey v. Watson, *supra*.

(*f*) Wetherell v. Collins, 3 Madd. 255.

(*g*) Ramsden v. Langley, 2 Vern. 536.

(*h*) Hunt v. Fownes, 9 Ves. Jun. 70.

(*i*) Skip v. Wyat, 1 Cox, 353.

(*k*) *Et vide* Wilson v. Metcalfe, 3 Madd. 45.

between the last mentioned case, in which the concurrence of the heir at law of the mortgagee was necessary only to the establishment of the devisee's title, and the case of costs arising from the nature of the assurance required in the reconveyance of the mortgage estate; as for example: if a fine be necessary to divest the estate from a feme covert, or an order of the Court of Chancery be required to procure a conveyance from an infant heir of the mortgagee: in which cases, the expenses must be borne by the mortgaged estate. If a mortgagee be guilty of gross misconduct, he will be refused costs (*a*), and even, under certain circumstances, be compelled to pay them (*b*).

It is equity, that the creditor shall not be deprived of his pledge without payment of all sums of money due to him from his debtor, which form a general or specific lien on the land: and, therefore, if the mortgagee advance other sums of money to the mortgagor expressly by way of further charge (forming a specific lien); or on judgment, or statute (forming a general lien), neither the mortgagor, nor (generally speaking), any one claiming under him, shall be allowed to redeem without a settlement to the full amount (*c*): but this doctrine cannot apply if the security *could* not form a lien on the estate, either specifically or generally; and, therefore, as copyholds are not at law liable to an extent, a judgment debt cannot be tacked to a mortgage of copyhold land (*d*).

(*a*) Mocatta v. Murgatroyd, *supra*.

(*b*) Detillin v. Gale, 7 Ves. Jun. 583.

(*c*) 2 Eq. Fonbl. 270. 5th Edit.

(*d*) Heir of Cannon v. Pack, 6 Vin. 222. Pl. 6.

In a modern case (*a*), a question arose, whether a docketed judgment, on which no execution had issued at the time of the bankruptcy of the debtor, could be tacked to a mortgage executed by him of his estate, and this depended on the construction of the statute 21 Jac. I. (*b*), which declares, that all creditors having security for their debts by judgment, statute, recognizance, specialty with or without penalty, or other security, &c. whereof there is no execution or extent served and executed upon the lands or goods, &c., of such bankrupt before such time as he shall become bankrupt, shall not be relieved upon any such judgment, statute, &c., for any more than a rateable part of their just debts with the other creditors. It was argued for the assignees, that the statute was peremptory, and the judgment creditor could not tack; but the Master of the Rolls observed, that it appeared to him very difficult to conceive how a supervening bankruptcy could affect the right of the first mortgagee; the statute, he thought, related to judgments that continued merely such at the time of the bankruptcy, and not to such as acquired all the effect of an actual mortgage, as in the present case of a judgment obtained by a party having an antecedent mortgage; and he decided accordingly.

How far a *bond debt* may be tacked to a mortgage, has excited a good deal of discussion; the point appears to be now settled. The cases on this

(*a*) Baker v. Harris, 16 Ves. 397.

(*b*) Cap. 19. sec. 9.

head, in the books, are numerous. It will be here sufficient to trace the doctrine, and state the results; premising only, that it makes no difference in the right of tacking, whether the bond debt is prior or subsequent to the mortgage (*a*), or whether the mortgage be made to the bond creditor originally, or be taken by assignment (*b*).

In an early case (*c*), which was heard before the Lord Keeper in Trinity Term, 35 Car. 2. (being prior to the statute of fraudulent devises), a mortgagor having brought his bill to redeem, the mortgagee insisted on his right to have a bond debt first paid, as well as the mortgage debt. The Court held, that although there was no special agreement proved that the land should stand as a security for the bond debt, yet the mortgagor should not redeem without paying both. In a case which was heard in the first of James 2. (*d*) (being also prior to the statute), the like doctrine seems to have prevailed; although in that instance the land in mortgage happened to be held for a chattel lease; on which the Court seems to have laid some stress. In a case which occurred shortly after the passing of the act (*e*), a

(*a*) Windham v. Jennings, 2 Ch. Rep. 247.

(*b*) Halliley v. Kirtland, *ibid.* 360.

(*c*) Baxter v. Manning, 1 Vern. 244.

(*d*) Halliley v. Kirtland, *supra.*

(*e*) Anon. 3 Salk. 84.—In a note to this case in the 6th edition, it is stated, that, from the cases there cited, it appears that the mortgagee may tack his bond against the *mortgagor*, his heir or beneficial devisee, but not against creditors, trustees for creditors, or other persons entitled by a valuable consideration. It will be presently seen, that the learned editor has been misled as to the *mortgagor*.

similar decree was made by Lord Chancellor Somers.

It is unnecessary to remind the reader, that, prior to the statute of fraudulent devises, the devisee of real estate was not subject to debts by specialty, and that if the heir aliened them before action brought, the creditor was without remedy at law. The 3rd of William and Mary (*a*) therefore made the beneficial devisee equally liable as the heir, and rendered them both subject to account at law for the value of lands aliened; but it was held that the statute did not apply to devises for payment of debts.

Soon after the passing of the statute, the rule as to the tacking of bond debts seems to have received a very considerable alteration as far as respected the mortgagor himself; for a new doctrine appears to have arisen, viz. that the right to tack the bond debt to the mortgage was for the sole purpose of preventing a circuity of action (*b*); the heir and beneficial devisee having become at law liable to the debt. And, therefore, it was held, that the right to tack the bond debt to the mortgage should be confined to these only, and not extend to the mortgagor; and much less to creditors or others claiming under him for a valuable consideration.

One of the earliest cases in which this new doc-

(*a*) Cap. 14.

(*b*) *Vide* Heams v. Bance, 3 Atk. 630. Lowthian v. Hasel, 3 B. C. C. 162. Anon. 2 Ves. 665.

trine appears, is that of Challis v. Casborn (*a*); in which it was said by Mr. Vernon, and agreed to by the Court, that if a man has a debt owing to him by mortgage, and another on bond from the same person, he cannot tack them together against the mortgagor, but the mortgagor shall be let into a redemption on payment of the mortgage money only. In a subsequent case before Lord Macclesfield (*b*), the point is considered as clear; and the same rule is also laid down by Lord Hardwicke (*c*), and Lord Thurlow (*d*), and by the Judges of the Court of King's Bench, on an application to stay proceedings on payment of principal with interest and costs (*e*). The same doctrine is also distinctly recognized by Lord Alvanley in the case of Jones v. Smith (*f*); although, he observed, it was impossible to say why a bond might not be tacked to a mortgage as well as one mortgage to another*.

The point, therefore, may be considered as settled, that, as against the mortgagor himself, the mortgagee cannot insist on tacking a bond debt; nor does there seem to be ground for the difference hinted at by

(*a*) Prec. in Ch. 407.
(*b*) Coleman v. Winch, 1 P. Wms. 777.
(*c*) Morret v. Paske, 2 Atk. 53.
(*d*) Lowthian v. Hasel, *supra*.
(*e*) Archer v. Snatt, 2 Stra. 1107.
(*f*) 2 Ves. Jun. 376.

* In the case of Sharpnell v. Blake and Others, 2 Eq. Ca. Ab. 603., the Lord Chancellor is made to say, that by all the late cases a mortgagee can insist upon being paid a bond debt, even against the mortgagor himself. It is submitted, that, by the context, it is manifest that the word 'can' is misprinted for 'cannot.'

Mr. Cox in his valuable notes to Peere Williams (*a*), as to the application of this rule of court to cases between a mortgagor coming to redeem, and a mortgagee's bringing his bill to foreclose; for, in some of the preceding cases, the question arose on a bill filed by the mortgagor.

The cases are uniform, that the heir (*b*), and also the beneficial devisee (*c*), must redeem both. But if the devise be for payment of debts generally, the mortgagee must, as to his bond debt, come in rateably with the other creditors (*d*); and the result is the same, whether there be an express trust or only a charge for the payment of debts (*e*).

If a mortgage be made of a chattel real, and the mortgagor die indebted to the mortgagee by simple contract, and the executor of mortgagor bring his bill to redeem, he must pay both debts (*f*).

As to mesne incumbrances, whether by mortgage, judgment, or statute staple, it was laid down by Lord Hardwicke, that the bond creditor must be postponed, for he had not the same equity against a

(*a*) 1 P. Wms. 777.

(*b*) Shuttleworth v. Laycock, 1 Vern. 245. Coleman v. Winch, *supra*. Windham v. Jennings, 2 Rep. in Chan. 228.

(*c*) Challis v. Casborne, 1 Eq. Ca. Ab. 325. Pl. 9.

(*d*) Heams v. Bance, *supra*. Powis v. Corbet, 3 Atk. 556.

(*e*) Price v. Fastnedge, Amb. 685.

(*f*) Coleman v. Winch, *supra*. Eccles v. Thawill, Prec. Ch. 18. Anon. 2 Vern. 177.

puisne incumbrancer as against an heir at law (*a*). And this doctrine (which, as before observed, applies to a devise or charge in favor of creditors generally) has also been held to extend to other bond or specialty creditors. This was decided in a case before Lord Thurlow (*b*), in which it was attempted to be argued that the rule applied to other creditors of a higher nature; but the Court decided that the mortgagee could not tack against the other bond creditors.

The bond creditor also cannot tack against the assignee of the heir (*c*), or of the beneficial devisee, or of the executor (*d*).

An assignee from the mortgagor may of course redeem without payment of the bond debt; this is distinctly laid down by Lord Somers, who says, "if the mortgagor mortgage his equity of redemption to another, the second mortgagee shall not be affected with the bond; for it is but a personal charge on the mortgagor (*e*). In the case of Heams v.

(*a*) Morret v. Paske, *supra*. *Et vide* Corbet v. Powis, 3 Atk. 556. Anon. 2 Ves. 662.

(*b*) Lowthian v. Hasel, 3 B. C. C. 162.

(*c*) Bayly v. Robson, Pre. Cha. 89. Coleman v. Winch, *supra*. Troughton v. Troughton, 1 Ves. 87. Morret v. Paske, *supra*. Powis v. Corbet, *supra*.

(*d*) Coleman v. Winch, *supra*. Vanderzee v. Willis, 3 B. C. C. 20.

(*e*) Anon. 3 Salk. 84. *Et vide* Anon. 2 Ves. 663. Sharpnell v. Blake, 2 Eq. Ca. Ab. 603.

Bance (*a*), a trust was created by the will of the mortgagor for payment of debts, and it was held to prevent the bond creditor from tacking.

On the principle, that he who seeks equity shall do equity, and that equity will not deprive a creditor of the advantage of the legal estate, if obtained without fraud, it has been held, that if one estate is mortgaged for the payment of a debt, and another estate is mortgaged between the same parties for the payment of another debt, and the title to one estate proves defective, the mortgagor, or his assigns, shall not redeem without payment of both. In Jones v. Smith (*b*), the Master of the Rolls said, he understood the doctrine to be, that if two separate estates were mortgaged, that is, the *legal estate* absolutely, and at law irredeemably conveyed, the Court will not interpose in favour of the redemption of one without the redemption of both. In a subsequent part of the same case he adds, that "the mortgagor having parted with his interest at law cannot redeem without coming into equity; and if he has pledged one estate for a sum which it is not sufficient to answer, he shall not have the other unless he pays both debts." It must be, therefore, understood, that, with respect to third persons, it is necessary that the mortgagee should have the *legal estate*, to entitle himself to the benefit before referred to.

(*a*) 3 Atk. 630.
(*b*) 2 Ves. Jun. 376.

The doctrine in question, (although somewhat doubted by Lord Hardwicke in *Ex parte* King (*a*),) appears to have been early recognized in equity. Thus in a case (*b*) heard in Hilary Term 1681, it was stated by counsel as clear law, and not contradicted by the Court, that if a bill was brought to redeem two mortgages, and there was more money lent upon one of them than the estate was worth, the plaintiff should not elect to redeem one, and leave the heavier mortgage unredeemed, but should be compelled to take both or none. In another case (*c*), heard in Trinity Term 1684, the same doctrine is laid down in these words:—"So if there are two mortgages, and one is defective, if the mortgagor will redeem, he must take both." This was followed by a case (*d*), in which it appeared, that a man having made two several mortgages of several lands, and afterwards died, his heir at law claimed one of the estates as tenant in tail, and filed his bill to redeem the other estate. The defendant stated the facts; and it was decreed, that the plaintiff should redeem both or neither. And it is added, "So if one mortgage had been deficient in value, and the other mortgage had been more worth than the money lent upon it, the heir should not have been admitted to redeem the one without the other."

(*a*) 1 Atk. 300.
(*b*) Purefoy v. Purefoy, 1 Vern. 29.
(*c*) Shuttleworth v. Laycock, 1 Vern. 245.
(*d*) Margrave v. Le Hook, 2 Vern. 207.

In the next case (*a*), the very circumstance occurred which was mentioned in Margrave v. Le Hook. It appears that the assignee of a bankrupt filed his bill to redeem a mortgage of the *Manor of Newington*, in Kent, made by the bankrupt to the defendant. The defendant by his answer stated, that he had first lent the bankrupt £200 on mortgage of a *particular tenement*, and afterwards £300 on the manor, which was of better value than the money due, and that the first mortgage was deficient in value. It was adjudged, that if the plaintiff would redeem one, he should redeem both.

It certainly appears remarkable, that after such an uninterrupted series of decisions and authorities, so excellent a judge of equity as Lord Hardwicke should have expressed himself in the manner reported in *Ex parte* King (*b*); for in that case, the case of Pope v. Onslow being cited by Mr. Ord as an authority for the doctrine in question, Lord Hardwicke is made to say, that he was not satisfied this was the established rule of the Court; and that upon looking into the case of Pope v. Onslow, he found it very imperfect; and therefore declared he would not have it cited for the future, till it had been compared with the entry in the register's office; and added, he was very apt to believe that the tenements in Pope v. Onslow were parcel of and held of the manor, and *that* was the reason Lord Cowper so determined.

(*a*) Pope v. Onslow, 2 Vern. 286.
(*b*) *Supra.*

It seems, however, that Lord Hardwicke soon corrected his opinion; for in the much stronger case of Titley v. Davies (*a*), on an appeal to him from the Rolls, where a decree had been made on a bill filed by a purchaser of the equity of redemption of one of two estates in mortgage, that he must redeem both and not one only, his lordship affirmed the decree. The same doctrine, to the like extent, was acted upon by Sir Thomas Sewell in Tribourg v. Lord Pomfret (*b*), and was admitted in *Ex parte* Carter (*c*).

A case also occurred at law (*d*), in which the assignee of a bankrupt having moved to stay proceedings on payment of principal, interest, and costs due on the mortgage in question, it was objected that there were two other mortgages of different premises for certain other sums due from the bankrupt to the mortgagee, on which the Court refused to compel a redemption on payment of the first mortgage only, and discharged the rule with costs.

Two other cases are cited in Jones v. Smith (*e*) confirmatory of the doctrine, and extending it, as in the preceding cases of Titley v. Davis, Tribourg v. Lord Pomfret, and *Ex parte* Carter, to the assignee of the mortgagor, although without notice.—The first is the case of Cator v. Charlton, heard the

(*a*) Cited in *Ex parte* Carter, Amb. 733.
(*b*) Cited *ut supra*.
(*c*) Amb. 733.
(*d*) Roe v. Solly, 2 Bl. 726.
(*e*) *Supra*.

21st of June 1775. In that case, Stokes mortgaged to Charlton for £1400. Afterwards Charlton advanced, at different times, several other sums of money, and different premises were added, and made redeemable on payment of £1900, and interest. These securities were registered; and afterwards, the mortgagor assigned to the plaintiff the premises first mortgaged. The defendant (the mortgagee) admitted there was no agreement in writing or otherwise between Stokes and him that the first premises should be a security for more than £1400 and interest, but he insisted that the plaintiff was not entitled to a redemption without paying the whole beyond the £1400; and *that registering the incumbrances was full notice of them.* The decree was, that the assignee could not redeem without paying the whole.

On a consideration of this case, it is apparent, that the decision could not have turned on the point of *notice;* registering not being of itself notice. The decree must therefore have proceeded on the general principle before stated. Accordingly we find, in the second of the cases above mentioned, the decision is not at all referred to the point of notice. This is the case of Collett v. Munden, heard before Lord Kenyon, May 31st, 1786, and in which he decided, that the assignee of the equity of redemption of one estate could not redeem without paying off a distinct mortgage on a separate estate.

In the case of Jones v. Smith also, the Master of the Rolls puts the doctrine on the broadest ground. He says, "Those cases (that is, of Cater v. Charlton,

and Collett v. Munden), amount to this, "that if a man makes a mortgage, and afterwards makes another mortgage for another sum, and then assigns the equity of redemption of one, both must be redeemed, and the case of the assignee is not better than that of the original mortgagor."

In a case reported by Mr. Cox (*a*), the precise point is stated and decided. This was a bill filed by the purchaser of an equity of redemption against the mortgagee to redeem. The defendant by his answer stated a subsequent mortgage made to him by the same mortgagor, of distinct premises, and for a distinct debt, and insisted that the plaintiff had no right to redeem the first mortgage, without redeeming the second. The Master of the Rolls said, he did not know why such a rule was ever laid down, but that it had been decided in many cases, that a mortgagee of two distinct estates, upon distinct transactions from the same mortgagor, was entitled to hold *both*, even against the purchaser of the equity of redemption of one of the mortgaged estates *without notice* of the other mortgage, until payment of the whole money due on both mortgages; and his Honor thought the persons interested in the equity of redemption of the second mortgage were necessary parties to the suit, and directed the cause to stand over to make these persons parties accordingly.

The preceding authorities therefore lead us to this

(*a*) Ireson v. Denn, 2 Cox, 425.

conclusion, that if two or more distinct mortgages be made of different estates between the same parties, or if a sum of money be advanced on one estate, and other estates be afterwards made a security for the sum already advanced, and also for further advances, but without any agreement that the first estate shall be charged with the further advances, nevertheless, neither the mortgagor nor any one claiming under him the equity of redemption of one of the estates, although without notice of the other mortgage or charge, shall be permitted to redeem one mortgage without redeeming both. From this doctrine it is manifest that great care and caution are requisite in a purchase or mortgage of an equity of redemption, and that the first mortgagee should not merely be questioned as to the amount of the actual mortgage on the estate intended to be purchased or mortgaged, but generally what is the extent of his charge or lien upon it.

It may be necessary to add, that to apply this doctrine, the transaction must be between the same parties, or those claiming under them; for if *A.* concur with *B.* in a mortgage of Whiteacre to *C.*, and afterwards *B.* mortgage Blackacre to *C.* for a different sum, nevertheless *A.* and those claimants under him may redeem Whiteacre without also redeeming Blackacre).

In some Reports of Lord Northington, recently

(*a*) Jones v. Smith, 2 Ves. Jun. 376.

published by Mr. Eden, a case is to be found (*a*) clashing with the decision in Ireson v. Denn, it being there considered as law that the principle before discussed of the right of the mortgagee to insist on a redemption of both mortgages or neither, applies only so long as the equities of redemption remain united in the same person. But the current of modern authorities is certainly to the contrary, as observed by the learned editor in his note to that case, and as before mentioned.

There is, however, a distinction alluded to by the counsel for the plaintiff, in Willie v. Lugg, which may, perhaps, be considered to be sound, viz. in cases where the mortgages were originally made to different persons, and are afterwards assigned to one mortgagee, for in this case great injustice might arise to the purchaser of one of the equities of redemption, if he could be prejudiced by a subsequent union of the legal estates in the same mortgagee. Perhaps it may not be unreasonable to suppose, that a farther distinction may be made in respect to the time when the purchase of one of the equities of redemption is completed, viz. whether before or after the union of the mortgages in one person; for if the mortgages should be united in the same person previously to the sale, that is, at the time when the equities remain united in one person, it may be considered, that, as the general principle will apply as against the mortgagor, the right having once accrued to the mortgagee shall not be defeated by the subsequent act of the mortgagor. But if the sale take place prior to

(*a*) Willie v. Lugg, 2 Eden, 78.

the union of the mortgages, or, in other words, if the equities are separated before the mortgages are united, the right never accrues to the mortgagee.

It is laid down in a case of frequent reference (*a*), that, if a sum of money be secured by mortgage, the mortgagor would not be admitted to redeem after the day of payment was lapsed, without paying likewise all that was due to the mortgagee *on notes or simple contract.* The same doctrine is stated in the Treatise on Equity (*b*).

Notwithstanding these authorities, a mortgagee cannot, it seems, tack a mere simple contract debt against a mortgagor (*c*). In a recent case (*d*), it appeared that Hopkins had demised lands to Ford for a term of years, for securing 400*l.* and interest. A further sum was afterwards lent by Ford, who died, and Hopkins became bankrupt. The executors prayed a sale, and an application of the money produced by the sale to the discharge of both sums. Lord Eldon said, he was confident there never was a case where a man having taken a mortgage by a legal conveyance, was afterwards permitted to hold that estate as farther charged, not by a legal contract, but by inference from the possession of the deed; and the order was consequently confined to the mortgage debt.

(*a*) Demainbray v. Metcalf, Prec. in Ch. 421.

(*b*) Vol. II. 274. 5th Edition.

(*c*) Newby v. Cooper, Finch's Rep. 379, *et vide* Jones v. Smith, 2 Ves. Jun. 378.

(*d*) *Ex parte* Hooper, 19 Ves. 477.

A mortgagee of a lease or other chattel interest may, however, tack a simple contract debt against the executor (*a*), but not against creditors coming to redeem, or purchasers for a valuable consideration (*b*), or creditors for whose benefit the equity of redemption has been assigned by the executor (*c*); and such a mortgagee may tack a bond debt against the mortgagor (*d*).

The next rule to be noticed in the doctrine of tacking, applies itself to the rights of mesne or intermediate incumbrancers, and is of great importance to be well understood.

It is thus stated in the Treatise on Equity (*e*):— "*In æquali jure melior est conditio possidentis;* Where equity is equal, the law shall prevail: and he that hath only a title in equity, shall not prevail against law and equity. As a purchaser or mortgagee coming in upon a valuable consideration without notice, and purchasing in a precedent incumbrance, it shall protect his estate against any person that hath a mortgage subsequent to the first and before the last mortgage, though he purchased in the incumbrance after he had notice of the second mortgage, for he has both law and equity".

(*a*) Coleman v. Winch, 1 P. Wms. 776.
(*b*) *Vide supra.*
(*c*) Adams v. Claxton, 6 Ves. 226.
(*d*) Halliley v. Kirtland, 2 Cha. Rep. 360.
(*e*) Vol. II. 300. 5th Edition.

In considering this rule of equity, Lord Hardwicke has remarked (*a*), "that it could not happen in any other country but this, because the jurisdiction of law and equity is administered here in different courts, and creates different kinds of rights in estates; and therefore as courts of equity break in upon the common law, where necessity and conscience require it, still they allow superior force and strength to a legal title to estates; and therefore where there is a legal title and equity on one side, the Court of Chancery never thought fit that, by reason of a prior equity against a man who has a legal title, that man should be hurt, and this, by reason of the force which the court necessarily and rightly allows to the common law, and to legal titles; but if this had happened in any other country, it could never have been made a question; for if the law and equity are administered by the same jurisdiction, the rule, *qui prior est tempore, potior est jure*, must hold."

The doctrine in question appears to have invariably prevailed in equity; for we find it laid down in a very early case (*b*), "that it was the constant practice of the court, if a purchaser *bonâ fide* did buy in an eigne incumbrance, statute, or judgment, and there were a judgment or statute mesne between that and his purchase, of which he had no notice at his purchase, that he should protect his purchase with the eigne incumbrance so brought in; and that, though judgments were on record, and a purchaser was

(*a*) Wortley v. Birkhead, 2 Ves. 574.

(*b*) Churchill v. Grove and Others, 1 Ch. Ca. 35. 15 Car. 2.

bound to take notice thereof at law, yet in equity, where the cognizee of a judgment comes to be helped to extend his judgment against a purchaser, he must shew express notice of the judgment in the purchaser, or else shall never be relieved against the purchaser (*a*)."

In a subsequent case of constant reference on this point, the doctrine was brought under the full consideration of the Lord Keeper, assisted by Lord Chief Baron Hale and Justice Rainsford (*b*). In that case it appeared, that English being seised of the manors of Wicksall and Monfield in fee, did, in 1649, mortgage part of the manor of Wicksall to one Burrell for 1000*l.* In 1655, he acknowledged a statute to Burrell of 800*l.*, for securing 400*l.* In 1662, English mortgaged both manors to Mrs. Duppa, for 500 years, for 7000*l.* In 1665 he mortgaged the manor of Wicksall to Lee for 2000*l.* Lee had no notice of the prior incumbrances. After Mrs. Duppa's death, her executors brought actions of ejectment against English, and filed their bill of foreclosure against him. In Michaelmas Term 1667, English suffered judgment in ejectment against him at the suit of the executors, with a *cesset executio* until May 1668. The *cesset executio* having expired, English obtained an injunction against the proceedings at law until hearing, and on the 5th of June 1668, a

(*a*) *Et vide* Hacket and Bedel v. Wakefield, Hard. 172. 12 Car. 2.

(*b*) Marsh v. Lee, 2 Ventris, 337. 1 Ch. Ca. 163.

decree was made, that English should redeem within a twelvemonth, or be foreclosed. On the 26th of November 1668, the Master reported that 8530*l.* 14*s.* would be payable to the plaintiffs on the 6th of June 1669. On the 27th of November 1668, Lee, by the advice of counsel, purchased in the mortgage and statute from Burrell. On the 5th of February 1669, the Master's report was confirmed. Both the manors were afterwards extended by Lee under the statute. The executors then filed their bill against Lee, and prayed to be allowed to redeem on payment of principal and interest due on the securities given to Burrell. The Court held, first, that Lee might make use of these incumbrances to protect his own mortgage, for he had both law and equity for him. But that, secondly, inasmuch as the mortgage to Burrell was but of part of the manor of Wicksall, although the whole manor was mortgaged to Lee, yet that the first mortgage should not extend to cover more than the part that was in the first mortgage. And Lord Chief Baron Hale put this case:—If a man, seised of sixty acres, mortgages twenty to *A.*, and then mortgages the whole to *B.*, and then the whole to *C.*, and afterwards *C.* purchases in the first mortgage, that shall not protect more than twenty acres; but it shall protect those twenty acres, so as *B.* shall never recover those lands until he pay *C.* all the money upon the first and last mortgages. And, thirdly, Hale said, he thought that in this case, inasmuch as the mortgage to Lee (*a*) was only of part of Wicksall, that, therefore, the executors might bring Lee to an account upon the extended value, whereupon these two manors were extended upon

(*a*) This is clearly a mistake in the report, and means 'to Burrell.'

the statute; and that if Lee had received the money due upon the statute, by receiving of the profits according to the extended value, or if the executors would pay down the residue of the money due upon the statute, or would pay down so much as the proportion would come to for Monfield, that then they might discharge the manor of Monfield, and he thought there might be a proportion found out by the Court.

In the preceding case the doctrine in question was established to its fullest extent, and in the case of Edmunds v. Povey (*a*), after long debate, in which it had been argued, that though this trade of buying in incumbrances had been formerly countenanced, yet it was, in truth, against conscience, and contradictory to many established rules of law and equity, the Lord Keeper told the counsel, he wondered they laid their shoulders to a point that had been so long since settled and received as the constant course of chancery; but he added, that although he would not change the rule which had so long prevailed in that Court, yet it might be, he would do so when he found a man designing a fraud, and thinking to make a trade of cozening by the rules of the Court (*b*).

An exception to the rule, however, prevails, if the first mortgagee takes the assignment as a trustee for another person; in which case he shall not be allowed to tack the mortgages, for if he might, then a mere stranger purchasing the third mortgage, and

(*a*) 1 Vern. 187.
(*b*) *Et vide* Holt v. Mill, 2 Vern. 280.

declaring he had bought it in trust only for the first mortgagee, might tack both together, and defeat all the other incumbrancers (*a*). In a recent case (*b*), a question arose, whether the executors of a first mortgagee of a leasehold, who had the legal estate in his own right, could, as against a mesne incumbrancer, tack a mortgage of the equity of redemption, which had vested in their testator as the executor of another. The facts were, that John Brooke assigned leasehold premises to Samuel Barnett, for securing 3000*l.* He then made a second mortgage to him for securing 500*l.* He then mortgaged the equity of redemption to Hunt for securing a sum of money. He then made a further charge to Samuel Barnett. He afterwards mortgaged the equity to Sadler, and ultimately to William Barnett, the brother of Samuel. William Barnett died, and appointed Samuel his executor. Afterward Samuel died, and the bill was filed by the executors of Samuel, claiming to be paid all the advances made by Samuel, and to tack the mortgage made to William, in preference to the mortgages of Hunt and Sadler. No case was cited. The Master of the Rolls said it was surprising that no authority could be produced, for the point must have occurred. He then proceeded to state, that the law of that Court gave a person who had obtained a mortgage of the equity of redemption the chance, that, if he got in the legal estate, he would have a priority over the mesne incumbrancer. But he asked, has that taken place? William Barnett never got the

(*a*) Morrett v. Paske, 2 Atk. 52.
(*b*) Barnett v. Weston, 12 Ves. 130.

legal estate, nor did any executor of him ever get it, for Samuel Barnett did not get it, as his executor, but had it himself in his own right before William Bartnett's mortgage had any existence, and nothing has happened to vary the rights. It was just the same, he added, as if the estates were in two different persons. As to all Samuel Barnett's own mortgages, the plaintiffs were, of course, entitled.

Before proceeding further, it may be necessary in this place to observe, that the advantage to be derived from getting in a precedent *statute* or *judgment*, depends upon the different procedure of the courts of law and equity in investigating the account on an extent; for, although lands are generally extended at much less than their true value, yet at common law the conusor, or he that claims under him, has no relief but by bringing a *scire facias ad computandum*, in which the conusee does not account according to the true value, but according to the extended value, and for the whole judgment or statute (*a*).

In a court of equity, the conusor may, however, bring the conusee to account for what he hath actually received, and shall recover all above the debt, with interest (*b*); but where an assignee of a judgment or statute extended is also a mortgagee, and consequently a creditor for a further sum, there he hath equal equity

(*a*) 2 Vent. 338. 4 Co. 69. (b) 3 Atk. 518. *et vide* Powell on Mortgages, Vol. I. 524. 4th Edition.

(*b*) *Vide supra*, page 65.

on his side to retain the lands until he be satisfied both for the statute and the mortgage; and he will not be brought to account for what he hath received above the statute or judgment debt on the extended value, unless he hath received enough to satisfy his mortgage also; consequently, if a mesne mortgagee would take off a statute or judgment in the hands of a puisne mortgagee by a suit in equity, the account must be as at law upon the extended value of what is due on the statute or judgment, and damages (*a*).

And in such case, where a statute, recognizance, or judgment is taken in by a mortgagee to defend a subsequent incumbrance, he will be no farther or longer protected by it than until he hath received so much of the profits as will satisfy the original security on the extended value, for then it will be avoidable by a *scire facias ad computandum*, or by an account to be taken in the Court of Chancery (*b*).

But there is a distinction between the effect of purchasing in an outstanding judgment, and purchasing in a statute (*c*), for the mortgagee cannot procure to himself, by taking in such security, an advantage beyond the interest to which the owner of his security was entitled; therefore, as a judgment creditor can extend but a moiety, a judgment will protect but a moiety in the hands of

(*a*) *Et vide* 2 Atk. 52.

(*b*) *Vide* The Earl of Huntingdon v. Grenville, 1 Vern. 52.

(*c*) *Vide* Powell on Mortgages, Vol. I. 482. 4th Edition.

his assignees; but if the first incumbrance be a statute staple, which, as before explained (*a*), attaches upon all the land of the conusor, a subsequent mortgagee buying in the statute may hold all the land, and thereby protect himself until *at law* the conusor of the statute, by a *scire facias ad computandum*, has got the statute vacated, which can only be upon payment of the penalty, for equity will not, in such case, give any assistance against a third mortgagee, without notice, until he has been paid his mortgage as well as the statute.

The doctrine established in Marsh v. Lee has been confirmed by a current of subsequent authorities, with some modifications, arising from existing circumstances. The landmarks of this doctrine are accurately stated in the more recent case of Brace v. the Duchess of Marlborough (*b*), which it is intended shall form the basis of the following observations, in which an attempt will be made to point out in what respects the law, as laid down in that case, has since been altered, confirmed, or enlarged.

The first general rule laid down in the case of Bruce v. the Duchess of Marlborough is, "that if a third mortgagee buy in a first mortgage, *though it be pendente lite*, pending a bill brought by the second mortgagee to redeem the first, yet the third mort-

(*a*) *Supra*, Book 1. cap. 5.

(*b*) Brace v. the Duchess of Marlborough, 2 P. Wms. 491.

gagee having obtained the first mortgage, and having the law on his side and equal equity, he shall thereby squeeze out the second mortgagee; and this the Lord Chief Justice Hale called a plank gained by the third mortgagee, or *tabula in naufragio*, which construction is in favor of a purchaser, every mortgagee being such *pro tanto*."

On this proposition, a matter of great importance occurs, viz. that although the third mortgagee get in the first mortgage, &c. *pendente lite*, he shall nevertheless be allowed to tack. The principle on which this doctrine is founded is satisfactorily explained by Lord Keeper Henley (*a*). He says, "The rule of equity requires no more than that the third mortgagee should not have had notice of the second at the time of lending the money; for it is by the lending the money without notice, that he becomes an honest creditor, and acquires the right to protect his debt. But he is not compelled to look for this protection till his debt is in danger of being prejudiced; and, therefore, when that danger is first discovered to him, (whether it be by *suit in equity*, or by any extra judicial means,) as the honesty of his debt is not affected by the discovery, so the right of protecting that debt, and the efficacy of such protection, are not prejudiced; hence arose the rule which permitted the subsequent incumbrancers to purchase *pendente lite*."

(*a*) *Vide* 1 Eden, 530.

This point may be considered as established. It will be seen that, in the before mentioned case of Marsh v. Lee, there was in fact *lis pendens* at the time that Lee got in the mortgage from Burrell; and in a subsequent case, in which (*a*) a second mortgagee having filed his bill against the first and third mortgagees to discover their incumbrances, after the bill filed, the first mortgagee assigned to the third, and the Lord Chancellor conceived he might lawfully do so. In a case before referred to (*b*), Butler, an attorney, mortgaged to Pace in fee; he then made a second mortgage of the same premises to Jarvis and Watson in fee; he then made a third mortgage of the same premises to Belchier and Ironside in fee; he then made a fourth mortgage of the same premises to Mary Butcher for a term of years; and, lastly, he made a fifth mortgage of the same premises to Renforth in fee, and delivered to him the complete title deeds. After the death of Butler, Belchier and Ironside the third mortgagees filed their bill against the devisee of Butler, and also against Pace, Renforth, and others, for a discovery of incumbrances. Renforth denied notice of the other incumbrances at the time the title deeds were delivered to him. Pace, the first mortgagee, said, that Butler delivered the title deeds to him at the time of the execution of his mortgage, but afterwards applied to him to see the writings, and gave him an

(*a*) Hawkins v. Taylor, 2 Vern. 29.
(*b*) Belchier v. Butler. Renforth v. Ironside, 1 Eden, 523.

undertaking that he would shortly return them; and Pace submitted to be redeemed by Belchier and Ironside. There is no further mention made in the report of the second mortgage to Jarvis and Watson. After these proceedings had been had, Renforth paid off the mortgage to Pace, and took an assignment of the security; and thereupon filed his cross bill, praying that the defendants might account with him for his own debt, and the mortgage to Pace. The judgment of the Court does not appear to have been at all influenced by the delivery of the title deeds. The decree was, that Renforth, by virtue of the assignment of Pace's mortgage, was entitled to hold the premises till satisfaction of the money due on both mortgages (*a*).

But although it is thus established, that *lis pendens* is not sufficient to prevent the third mortgagee from tacking his debt to a prior security, yet the Court will not allow him to tack after a decree made to settle priorities. In the case of Bristol v. Hungerford (*b*), a mortgage creditor got in a judgment after the first decree made, and in truth after the Master's report; and Lord Cooper held, that the mortgagee should not have the benefit of the judgment to protect his mortgage.

(*a*) *Et vide* Turner v. Richmond, 2 Vern. 81. Robinson v. Davison, 1 B. C. C. 63.

(*b*) 2 Vern. 524.

In a subsequent case (*a*), Lord Hardwicke confirmed Lord Cowper's decree; and in a more recent case (*b*), Lord Eldon observed, "There is no difficulty upon the point as to a decree to settle priorities. After that, you cannot tack certainly, for there is a judgment for the creditors that they shall be paid according to their priorities. But you may, (as held in the House of Lords (*c*),) up to the time of the decree, struggle for the *tabula in naufragio*, and though the decree is in a sense only a judgment upon the rights as they stood at the time of the bill filed, yet it was decided in that case, that until the decree you might tack."

The second rule laid down in Brace v. the Duchess of Marlborough is, "that if a judgment creditor, or creditor by statute or recognizance, buys in the first mortgage, he shall not tack or unite the mortgage to his judgment, &c. and thereby gain a preference; for such a creditor cannot be called a purchaser, nor has he any right to the land; he has neither *jus in re*, nor *jus ad rem*. All that he has by his judgment is a lien on the land, but *non constat* whether he will ever make use of it, for he may take his debt out of the goods of his debtor by *fieri facias*, or may take his body, after which, during the defendant's life, he can have no other execution: besides which, the judg-

(*a*) Wortley v. Birkhead, 2 Ves. 574.

(*b*) *Ex parte* Knott, 11 Ves. Jun. 619.

(*c*) Belchier v. Renforth, *supra*, *et vide* 5 B. P. C. 292.

ment creditor does not lend his money on the immediate view or contemplation of the land, nor is he deceived or defrauded, though his debtor had before made twenty mortgages of his estate; but a mortgagee is defrauded or deceived if the mortgagor has already mortgaged his land to another."

This rule and the reasons for it are so distinctly explained in the preceding statement, that little remains to be said on it. The distinction between the right of the mortgagee, having a specific lien, to tack his mortgage to a judgment, and of a judgment creditor, having a general lien, to tack his judgment to a mortgage, seems to be fully established. It was recognized by Lord Hardwicke in an anonymous case in Vesey (*a*), and there put on the ground, that the judgment creditor does not trust to the credit of the estate; and in the case of *ex parte* Knott (*b*), Lord Eldon explained that a mere judgment creditor, though he deals originally for a lien, does not get *an estate originally* in the land; he has neither *jus in re*, nor *jus ad rem*. He is therefore entitled only as a judgment creditor to an *elegit*, and cannot tack (*c*).

The next rule in Brace v. the Duchess of Marlborough necessary to be noticed is, that if a first mort-

(*a*) 2 Ves. 662.

(*b*) *Vide supra.*

(*c*) *Et vide* Stephenson v. Hayward, Pre. Ch. 310. Breerton v. Jones, 1 Eq. Ca. Ab. 326.

gagee lends a further sum to the mortgagor upon a statute or judgment, he shall retain against a mesne mortgagee, until both his securities are satisfied (*a*).

This rule results from the doctrine already noticed, *viz.* where equity is equal, the law shall prevail (*b*). But this principle will not apply unless the first mortgagee has the legal estate, *or the better right to call for it* (*c*); for otherwise, as hereafter noticed, the incumbrancers, whether by mortgage, judgment, statute, or recognizance, will be payable according to the priority of their respective incumbrances (*d*); nor will it apply if the first mortgagee had notice of the mesne incumbrance at the time of making the further advance (*e*). It must be also remarked that the principle can not apply in case the mortgage is of copyhold land, for copyholds are not extendible under a judgment, and consequently the judgment does not form a lien on the land (*f*).

Another rule in Brace v. the Duchess of Marlborough is, that as it appeared in that case, that although a puisne incumbrancer had bought in a prior mortgage, in order to unite it to his puisne incum-

(*a*) *Et vide* Shepherd v. Titley, 2 Atk. 352.
(*b*) *Supra*, page 409, &c.
(*c*) *Vide infra* page 424.
(*d*) Page 424.
(*e*) *Vide infra* page 429.
(*f*) Heir of Cannon v. Pack, 6 Vin. 222. Pl. 6.

brance, yet it being proved that there was a mortgage prior to the incumbrance bought in, he could make no advantage of his mortgage; because in all cases where the legal estate is outstanding, the several incumbrances must be paid according to their priorities in point of time; *qui prior est tempore potior est jure.*

In reference to this rule, it is first necessary to remark, that as between mere equitable claims, equity gives no preference to mortgages, judgments, statutes, or recognizances, but they are all payable according to their respective priority of dates (*a*); and it may be next remarked, that an exception to the rule arises where any one of the incumbrancers has a better right than the others to call for an assignment or conveyance of the legal estate; for in such case, the creditor having such right, will, it should seem, be placed in equity in the same situation as if he had obtained an actual assignment (*b*).

In the case of *Ex parte* Knott (*c*), it was debated, whether the general rule applied as between the assignees of a bankrupt mortgagor and *bonâ fide* incum-

(*a*) Symmes v. Symonds, 4 B. P. C. 328. Turner v. Richmond, 2 Vern. 81. Lord Bristol v. Hungerford, 2 Vern. 524. 1 Eq. Ca. Ab. 142.

(*b*) *Vide* Wyndham v. Richardson, 2 Ch. Ca. 218. Wilkes v. Boddington, 2 Vern. 599. Pomfret v. Windsor, 2 Ves. 487. *Ex-parte* Knott, 11 Ves. Jun. 618.

(*c*) *Supra.*

brancers. In that case, a mortgage in fee was executed *subject to an outstanding term of years.* Afterwards, a second mortgage was executed to another person; then (as was alledged) the mortgagor committed an act of bankruptcy, and afterwards executed a third mortgage to a different person, by whom, however, the act of bankruptcy was denied. A commission afterwards issued, grounded on the disputed Act of Bankruptcy, subsequently to which, the third mortgagee obtained a transfer of the mortgage in fee. The third mortgagee at first claimed a right to tack against both the assignees and second mortgagee, but on the argument, the claim against the second mortgee was abandoned, on the ground that the term of years being outstanding, operated as his protection on the principle now under consideration. But as to the assignees, a distinction was taken by the third mortgagee, who contended that they could not stand in a better situation than the bankrupt himself.

The assignees, on the other hand, contended that the assignment was a conveyance for the benefit of creditors, and placed them in the same situation as if the debtor had not been bankrupt, but had made a conveyance for the benefit of his creditors. The point was not decided, an issue being directed to try whether an act of bankruptcy had been committed previously to the date of the third mortgage.

In this case it was also endeavoured to be maintained by the assignees, that the commission resembled a decree to settle priorities, after which

there can be no tacking, as before noticed (*a*). But the chancellor denied the position, and said the commission was no judgment; it was only a conveyance for the security of creditors; from which it follows, that the issuing of the commission will not prevent the right of the mortgagee to tack, independent of the question of the advance being made after the commission issued.

The right of priority may be lost by *fraud*. In an able note by Mr. Fonblanque, in the Treatise on Equity (*b*), the principle is thus stated: "If a man by the suppression of the truth which he was bound to communicate, or by the wilful suggestion of a falsehood, be the cause of prejudice to another who had a right to a full and correct representation of the fact, it is certainly agreeable to the dictates of good conscience, that his claim should be postponed to that of the person whose confidence was induced by his representation."

If *A.* being about to lend money to *B.*, informs *C.* of his intention, and asks *C.* whether he has any incumbrance on *B.*'s estate, and *C.* denies that he has any, whereby *A.* is induced to lend his money to *B.*, and it proves that *C.* had at the time an existing mortgage or judgment on *B.*'s estate, this is fraud on

(*a*) *Vide* page 420.

(*b*) Vol. I. 164. 5th Edition.

the part of *C.*, and his security shall be postponed to that of *A.* But to fix *C.* with the fraud, it is necessary that he should be informed of *A.*'s *intention* to lend the money; for otherwise the fraudulent intention is wanting, on which the relief is to proceed, and the mere falsehood is not sufficient for such purpose (*a*).

If a prior incumbrancer is a party or privy to the subsequent transaction, and fraudulently conceals his incumbrance, this is also a ground for postponement (*b*), and more especially if the prior incumbrancer be professionally employed in the second transaction, and does not divulge his mortgage (*c*).

It was formerly held, that if a first mortgagee was a witness to the second incumbrance, this was sufficient evidence of concealment to postpone his mortgage (*d*); but this was subsequently questioned by Lord Thurlow (*e*), and does not seem now to be law.

How far the possession of the title deeds gives a puisne mortgagee a preference over a prior incumbrancer, has been made the subject of much discussion. The early doctrine certainly was, that the mere

(*a*) Ibbotson v. Rhodes, 2 Vern. 554. *Et vide* Hobbs v. Norton, 1 Vern. 136. Hunsden v. Cheyney, 2 Vern. 151. and the case of Pasley v. Freeman, 3 Term Rep. 51.

(*b*) Berrisford v. Milward, 2 Atk. 49.

(*c*) Draper v. Borlace, 2 Vern. 370.

(*d*) Moratta v. Murgatroyd, 1 Pr. Wms. 393.

(*e*) Becket v. Cordley, 1 B. C. C. 357. *et vide supra*, page 389.

fact of possession was such evidence of fraud on the part of the first incumbrancer, as of itself to postpone his security (*a*). A contrary opinion was however entertained by Lord Thurlow, who held there must be a *voluntary leaving* of the title deeds to entitle the second mortgagee to postpone the prior incumbrancer (*b*). The like opinion was entertained by Lord Cowper (*c*), and confirmed by a decision of the Court of Exchequer in the case of Plumb v. Fluit (*d*). In Evans v. Bicknell (*e*), the Lord Chancellor denied it to be *an established rule* that a second mortgagee with the title deeds, without notice of any prior incumbrance, should be preferred; and in the case of Barnett v. Weston (*f*), the point was given up without argument. From this it may be gathered, that at the present day the want of possession of the title deeds by the first mortgagee is open to explanation, and is only *primâ facie*, and not conclusive, evidence of fraud.

In all instances of the right to tack, it must be intended that the party claiming the right had no notice of the other incumbrance at the time of lending his money, for (as observed in Brace v. the

(*a*) *Vide* Goodtitle v. Morgan, 1 Term. Rep. 762. and Evans v. Bicknell, 6 Ves. Jun. 183.

(*b*) Tourle v. Rand, 2 B. C. C. 653. and Penner v. Jemmatt, there cited.

(*c*) Peter v. Russel, 1 Eq. Ca. Ab. 321. 2 Vern. 726. Gilb. Rep. 122.

(*d*) Cited 1 Fonb. 167. 5th Edition.

(*e*) *Supra.*

(*f*) 12 Ves. Jun. 133.

Duchess of Marlborough) this is his sole equity, and the notice must positively be denied (*a*), whether charged by the bill or not (*b*). What will amount to notice has been already considered (*c*). An exception to this rule appears to exist in a case of a mortgage being made to secure the sum then lent, and also further advances, and a second mortgage being afterwards made to another person *with notice of the first*, and further advances being subsequently made by the first mortgagee *with notice of the second:* in which case, Lord Cowper held, the first mortgagee might tack against the second, because it was the folly of the latter to lend his money on such a security (*d*).

Notwithstanding the dictum of Lord Redesdale in Latouche v. Dunsany (*e*), and the decision of Lord Erskine in *Ex parte* Herbert (*f*), it appears that an act of bankruptcy by the mortgagor, prior to the lending, will not prevent tacking (*g*); the judgment of Lord Eldon in *Ex parte* Knott (*h*) being mani-

(*a*) Cason v. Round, Prec. Ch. 226.

(*b*) 3 Pr. Wms. 244. note.

(*c*) *Vide supra*, "Notice;" and see also 2 Eq. Ca. Ab. 615. the case of Brothers v. Bence, in which a steward of a manor was held bound by notice arising from his admission of a mesne incumbrancer to a copyhold.

(*d*) Gordon v. Graham, 7 Vin. 52.

(*e*) 1 Sch. and Lef. 152.

(*f*) 13 Ves. 189.

(*g*) *Vide* Collet v. De Gols. For. 70. Co. Bank Laws, vol. I. p. 300. and Foxcroft v. Devonshire, 2 Burr. 938.

(*h*) 11 Ves. Jun. 609.

festly inaccurately reported, and not bearing the construction put on it by Lord Erskine.

Whether a *commission* of bankruptcy is so far *notice* as to prevent tacking of monies advanced subsequently to it, is an unsettled point; the case of Hitchcock v. Sedgwick (*a*), which was considered by Lord Talbot, in Collet v. De Gols, as an authority for such doctrine, having been reversed by the House of Lords (*b*). It would be waste of time in this work to enter into a discussion of the meaning of Lord Eldon's judgment in *Ex parte* Knott, after the consideration already given to it elsewhere (*c*). It may be sufficient to say that the general opinion of the profession appears to be, that sums advanced after an act of bankruptcy, but prior to the commission, may be tacked, but not sums advanced subsequently to the commission. A solemn decision of this question on bill and answer, and not on petition in bankruptcy, is a desideratum in this branch of the law.

Equity is not scrupulous by what means a *bonâ fide* incumbrancer, without notice at the time of advancing his money, obtains a legal protection for his security; for if he get in a judgment or statute which is satisfied, yet if he can make use of it at law for his protection, equity will not interfere to prevent him (*d*).

(*a*) 2 Vern. 155.

(*b*) 2 Vern. 162, note.

(*c*) Sugden's Vendors and Purchasers.

(*d*) Edmunds v. Povey, 1 Vern. 187. Sadler v. Bush, 2 Vern. 30.

In like manner, he may use a satisfied term for his protection (*a*). Nor is it material, although no consideration be paid by the mortgagee for the assignment of the judgment or term (*b*). But to give an incumbrancer the advantage of a judgment statute, or recognizance against an eigne mortgagee, the strict forms of law, as to enrollment and docketting, must, it is conceived, have been complied with, or otherwise they will not avail (*c*). If a judgment, &c. be got in by a mortgagee, equity will not permit a prior incumbrancer to procure a surreptitious release (*d*).

It is laid down by Mr. Powell (*e*), on the authority of a dictum in Equity Cases Abridged (*f*), that if a first mortgagee purchase in a subsequent judgment, *without the consent of the mortgagor*, a mesne mortgagee may redeem without payment of both, because such a transaction tends to burthen the estate, without bettering the security of the mortgagee; a position which, it is submitted, is not tenable.

(*a*) *Vide* Willoughby v. Willoughby, 1 Term. Rep. 763.

(*b*) Churchill v. Grove, 1 Ch. Ca. 35. Holt v. Mill, 2 Vern. 279. 1 Eq. Ca. Ab. 323.

(*c*) *Quære* whether the doctrine of notice, as recognized in Davis v. Strathmore, 16 Ves. 419. would apply to this case. *Vide supra*, page 69.

(*d*) Earl of Huntingdon v. Grenville, 1 Vern. 49.

(*e*) *Vide* 1 Powell, 536. 4th Edition.

(*f*) Vol. I. page 326.

CHAPTER II.

Of Interest.

THE Act of the 12th of Queen Anne, stat. 2. cap. 16., has enacted, "that all bonds and assurances for the payment of any principal money, whereupon more than five *per cent.* shall be reserved or *taken* (*a*), shall be void." This law was afterwards relaxed in favor of mortgages made in England of estates in Ireland or the West Indies (*b*); the statute of the 14th of Geo. III. cap. 79, having enacted, "that all mortgages and securities which, after the passing thereof, should be made and executed *in Great Britain* of or concerning any lands, tenements, hereditaments, slaves, cattle, or other things, lying and being in Ireland, or in any of his Majesty's colonies, plantations, or dominions in the West Indies, or any estate or interest therein, to any of his Majesty's subjects for securing the re-payment of the sums of money thereon respectively to be really and *bonâ fide* lent, with interest for the same, *and all bonds, covenants, and securities for payment of the same such money and interest*, and all transfers or assignments which should be made and executed *in*

(*a*) As to this, *vide* 3 Atk. 154.

(*b*) That prior to the passing of the 14 Geo. 3., such a mortgage was within the 12 of Anne. See Stapleton v. Conway, 3 Atk. 727. 1 Ves. 428.

Great Britain, of such mortgages, securities, *or bonds*, should be as good, valid, and effectual as such mortgages, securities, *bonds*, *covenants*, transfers, or assignments, would be if the same were made and executed in any island, plantation, country, or place, where the lands, tenements, hereditaments, slaves, cattle, or other things to be mentioned or comprised in any such mortgage, security, transfer, or assignment as aforesaid, severally lay or were; and that none of his Majesty's subjects should be subject or liable to any of the penalties or forfeitures of the said Act of Queen Anne, by receiving or taking interest for the sum or sums of money lent on any such mortgage, security, *bond*, *covenant*, transfer, or assignment as aforesaid, so as the interest so to be received or taken did not exceed the rate of 6 *per cent. per annum.* But it was declared that the Act should not make good any such mortgage, security, *bond*, *covenant*, transfer or assignment, where the lender or lenders of any sum or sums of money should knowingly advance or lend thereon more money than the lands, &c. in such mortgages, &c. should be, at the time or times of advancing or lending such sum or sums of money as aforesaid, really and *bonâ fide* worth to be sold. And that all persons borrowing any sum of money under the authority of that Act upon any such land, &c. exceeding the value which the same should, at the time of borrowing such money, be really and *bonâ fide* worth to be sold, over and above all incumbrances which should then affect the same, should forfeit triple the value of the sum borrowed; the one half to be paid to the informer,

the other half to the treasurer of Greenwich Hospital. And that all such mortgages or other securities granted under the authority of the said Act, by which such lands, &c. were intended to be charged or affected, should be registered within the island, &c. where the said lands, &c. severally lay or were, within the time limited by the laws of such island, &c.; or otherwise the same should be subject to the several provisions and penalties of the statute of Queen Anne in such manner as the same would have been if the said Act of George the Third had never been passed, unless the mortgagee, or other person or persons for whose behoof such mortgage or other security should have been made or granted, should have *bonâ fide* used his or their utmost endeavour to cause the same to be registered within the time thereinbefore limited for that purpose.

On this statute of George the Third, a doubt arose, whether it authorized a bond or covenant executed for payment in England of the principal money secured on lands in Ireland or the plantations, reserving more than *5 per cent.*, on the ground, it is said, that the statute does not mention *personal contracts* (*a*). The case referred to, as raising this doubt, was heard before the Court of King's Bench (*b*). The circumstances were, that in the purchase of an estate in the West Indies, it was agreed that part of the purchase-money should be secured by the bond of the purchaser, and of

(*a*) 2 Powell, 959.

(*b*) Dewar v. Sparr, 3 T. R. 425.

some other person resident in England, with interest at 6 *per cent.* A bond was accordingly executed by the purchaser and his surety, to the vendor. *After the vendor's death*, his personal representative agreed that the bond should be *cancelled*, and further time given, and a fresh bond should be entered into by the purchaser and a different surety for payment of the principal with the like rate of interest; and accordingly another bond was given by the purchaser and the defendant. In this case, the Court, on action brought by the obligee against the surety, held that the bond was usurious, the statute not extending to *personal contracts*. On perusing the Act it is difficult to arrive at this conclusion, as the statute expressly mentions bonds and covenants, which are both personal contracts. But independent of this consideration, it is submitted that to make the case apply to the matter in question, it must be conceded that the personal representative of the vendor, notwithstanding the release of the first bond, had still an equitable lien on the lands for the money due (a position which it might be difficult to maintain); for otherwise it was merely the case of a bond between two persons resident in England, for interest at 6 *per cent.*

To remove however the scruples excited by the last-mentioned decision, as well as the doubts entertained by the profession at large on the point, the legislature has recently thought proper to pass an Act (*a*) to explain the Act of the 14 of Geo. III., by which, after reciting the Act of the 14 of the late

(*a*) 1 and 2 Geo. IV. cap. 51.

king, and that doubts had been entertained whether the provisions and declarations of the said Act extended to bonds and covenants of third parties given as a collateral security for the payment in Great Britain of the interest for the sums of money advanced or lent as therein mentioned, it is enacted, for obviating such doubts, that all mortgages and securities which, by any of His Majesty's subjects already had been, or thereafter should be, made and executed in Great Britain, of and concerning any lands, tenements, hereditaments, slaves, cattle, or other things lying and being in Ireland, or in any of the colonies, plantations, or dominions in the West Indies, or any estate or interest therein, to any of his Majesty's subjects, for securing the repayment of the sums of money thereon respectively, really, and *bonâ fide* advanced and lent, with interest for the same, whether payable in Great Britain, or in the country, island, plantation, or place where the lands, tenements, hereditaments, slaves, cattle, or other things mentioned and comprized in any such mortgage, security, transfer, or assignments as aforesaid severally lie or are; *and all bonds and covenants* which had been or which thereafter should be made and executed *in Great Britain*, either by the person borrowing such sums of money, or *by any other person or persons*, either residing in Great Britain or elsewhere, by way of collateral security for the payment of such interest; and all transfers and assignments which had been or which thereafter should be made and executed in Great Britain, of such mortgages, securities, or bonds, to any of His Majesty's subjects, should be as good, valid, and effectual, to all intents and purposes what-

soever as such mortgages, securities, bonds, transfers, or assignments would have been if the same had been made and executed, and the interest thereon had been made payable, and the person or persons entering into such bonds or covenants by way of collateral security had resided in the country, island, plantation, or place where the lands, tenements, hereditaments, slaves, cattle, or other things mentioned and comprized in any such mortgage, security, transfer, or assignment as aforesaid, severally lie or are; and that none of his Majesty's subjects in Great Britain should be subject or liable to any of the penalties or forfeitures in the Act made in the 12th year of Queen Anne, by receiving or taking, or having received or taken interest for the sum or sums of money really and *bonâ fide* advanced or lent, or to be advanced or lent, on any such mortgage, security, bond, covenant, transfer, or assignment as aforesaid, so as the interest so to be received or taken do not exceed the rate of £6 *per cent. per annum.* This statute has set at rest the doubt before stated.

It is material to consider to what extent, and in what manner, the interest due on a mortgage debt may, *by agreement inter partes,* be converted into *principal,* and carry interest.

The governing principle acted upon in matters of mortgage by Courts of Equity is, (as already frequently noticed) that the mortgagee shall be entitled only to principal, interest, and costs; and it protects the debtor with peculiar jealousy against

any attempt on the part of the mortgagee, by taking advantage of the necessities of the mortgagor to impose on him harsher terms. Acting on this principle, equity has held that an agreement entered into at *the time of the loan*, for converting interest into principal from time to time as it shall become due, is oppressive and unjust, and tending to usury, and that consequently it cannot be supported (*a*).

When interest has once accrued due, it becomes a debt. There is no longer therefore any objection to an agreement *inter partes* that it shall be considered principal, and thenceforth carry interest. Indeed it would be injurious to the mortgagor to establish the contrary, as it would remove an inducement to the mortgagee's permitting his principal to remain; and consequently equity has recognized such agreements (*b*); but there must be no extortion on the part of the mortgagee, or otherwise equity will interpose to the relief of the mortgagor; as in a case reported in Atkins (*c*), in which the mortgagee compelled the mortgagor to come to an account every six months, and convert interest into principal at *5 per cent.*, when the interest reserved in the deed on the principal money, was at 4 and a half *per cent.* only. According to the report in At-

(*a*) Broadway v. Morecraft, Mosely, 248. Mitford v. Featherstonhaugh, 2 Ves. 445. Sir Thomas Meer's Case, cited in For. 40. Ossulston v. Yarmouth, Salk. 448. Chambers v. Goldwin, 9 Ves. 271.

(*b*) Brown v. Barkham, 1 P. Wms. 654.

(*c*) Thornhill v. Evans, 2 Atk. 330.

kins, Lord Hardwicke decreed an account of the principal money with interest at 4 and a half *per cent.*, and of any fresh advances with interest at 5 *per cent.* To this case, a note is added by Mr. Sanders, by which it appears that the Court allowed interest at 4 and a half *per cent.* only, for such arrears of interest as the mortgagor had by agreement in writing, consented should be converted into principal.

Equity considers the arrear of interest so converted into principal by agreement between the parties, in the light of a *further advance.* But inasmuch as a further loan made by a mortgagee after notice of a puisne incumbrance is not allowed to be tacked, but must be postponed to that incumbrance, it follows that a mortgagee shall not be allowed to convert interest into principal, as against a subsequent charge of which he had notice at the time of the agreement (*a*).

The conversion of interest into principal must appear by the manifest intention of the mortgagor: it is not sufficient that an account be *stated* between the parties. The agreement that interest shall become principal and carry interest, must be declared by writing under the hands of the parties (*b*), and the mortgage duty must be paid on

(*a*) Digby v. Craggs, Amb. 612. 2 Eden, 200.
(*b*) Brown v. Barkham, *supra.*

the amount, in like manner as on any other fresh advance.

In a very recent case (*a*), two singular questions arose as to compound interest on mortgage. It appeared that a good legal mortgage had been executed by Bassett, for securing to one Brooman 750*l.* and interest half-yearly. Subsequently a second mortgage was executed between the same parties for a sum of 1200*l.*, which was composed of the principal sum of 750*l.*, and interest thereon, *with interest on that interest.* The mortgage was assigned to Sacket, who filed his bill of foreclosure against Bassett and Brooman. On the usual reference to the Master to take an account, he reported his opinion, that nothing was due on the second mortgage, it being usurious, and that the first mortgage had been satisfied by the second, and consequently nothing was due on that mortgage. It was contended for the assignee of the mortgage, that the second mortgage was valid, because the interest having become due, was a debt recoverable at law; but even if it were usurious, yet the first mortgage would be good. The Vice-Chancellor directed an action at law to be brought on the covenant on the second mortgage deed, to try whether it was usurious or not.

Independent of the agreement between the parties, equity will, in certain cases, of its own authority,

(*a*) Sacket v. Bassett, Anon. 4 Madd. 58.

direct interest to be paid on interest. Indeed, in a case heard before Lord Keeper North (*a*), his lordship attempted to introduce a general principle, that as to so much of the interest as was reserved in the body of the deed, it should be accounted principal, for being ascertained by the deed, an action of debt would lie for it; and, therefore, it was reasonable there should be damages given for the non-payment of the money; and although it was urged there was not any such precedent in the Court, and if established, every scrivener would reserve all his interest half yearly from time to time, so long as the money should be continued on the security, which would be to change the law and practice of the Court, and make all mortgagors pay interest upon interest; yet the Lord Keeper said, he was clear in that distinction between debt and damages, and saw no inconvenience that could ensue; it would only serve to quicken men to pay their just debts, and he decreed accordingly.

The rule so attempted to be introduced by the Lord Keeper, has not, however, been followed, and it is conceived its establishment would have had the effect above alluded to, *viz.* that of making all mortgagors pay interest upon interest, and might have been the means of oppression on the debtor. If, as is urged (*b*), the compound interest would have the effect of preventing the mortgagee proceeding against the mortgagor when an arrear became due, that advant-

(*a*) Howard v. Harris, 1 Vern. 190. *Et vide* note, 4 Madd. 64.
(*b*) *Vide* note, 4 Madd. 64.

age can be still obtained by the mortgagee by such an arrangement when the arrear of interest has arisen. In practice it is found, that a considerable arrear of interest is frequently allowed to take place before any harsh proceedings are commenced by the mortgagee, during which period the debtor is released from the weight of compound interest, and in those cases, in which the regular payment of the interest is of importance to the creditor, the allowance of compound interest for the non-payment would be a very inadequate remuneration, and would not long have the effect of preventing a sale or foreclosure. In the case of Thornhill v. Evans (*a*), a demand was made by the mortgagee for compound interest for fifty days, on the supposition that he was entitled to interest upon the interest in arrear when the mortgage was paid off; but Lord Hardwicke refused it, saying, it was never allowed in a Court of Equity. The like decision had been made in an earlier case (*b*), the Master of the Rolls adding, that although the profits were not sufficient to answer the interest, yet the arrears could not carry interest, but the costs and charges must (*c*).

Interest will, however, be converted into principal, and carry interest after the Master's report has been made and *confirmed*, and will be computed from the time of confirming the report, and not sooner, be-

(*a*) *Supra.*

(*b*) Procter v. Cooper, Pre. Ch. 116. 2 Vern. 377.

(*c*) *Vide supra*, page 392. *ac etiam* Bickham v. Cross, 2 Ves. 471.

cause, until that time, it is not a liquidated sum (*a*). When the report is confirmed, the total sum, including principal, interest, and costs, will carry interest (*b*); but the arrear of interest cannot, even after the confirmation of the Master's report, be converted into principal, and carry interest to the detriment of intervening mortgagees, and other incumbrances (*c*).

An exception must be taken in the case of *infant* mortgagees, as against whom interest will not, *in general*, be converted into principal (*d*), unless the infant is *plaintiff* in the suit (*e*), or unless, under particular circumstances further time is given to the infant for his special benefit; as in a case (*f*) where interest on mortgage being in arrear, the mortgagee threatened to enter, the party entitled to the equity of redemption was an infant, who had nothing to subsist on but the rents of the estate; to prevent the mortgagee from entering and taking the rents, the infant's mother signed the account, as did also the infant who was then nearly of age, by which it was agreed, that the total amount should carry interest, and the Court decreed accordingly.

(*a*) Creuze v. Hunter, 2 Ves. Jun. 159. Kelly v. Lord Bellew, 1 B. P. C. 202.

(*b*) Attorney-General v. Brewers Company, 1 Pr. Wms. 377.

(*c*) Neal v. the Attorney-General, Moseley, 247. Harris v. Harris, 3 Atk. 722. and Digby v. Cragge, 2 Eden, 201.

(*d*) Bennett v. Edwards, 2 Vern. 392.

(*e*) Baddam v. Odell, 4 B. P. C. 349.

(*f*) Chesterfield v. Cromwell, 1 Eq. Ca. Ab. 287.

In a prior part of this treatise it has been observed (*a*) that the mortgagor, not being bound by the settlement of accounts between the mortgagee and assignee, *à fortiori* cannot be prejudiced by any agreement between them to increase the amount of the principal due, and consequently the arrears of interest cannot, generally speaking, without his concurrence, be converted into principal, and tacked to the mortgage (*b*). The rule, however, admits of distinctions upon particular circumstances, as in the case of Ashenhurst v. James (*c*), heard before Lord Hardwicke, in which it appeared, that a decree had been obtained for a sale of the equity of redemption of an estate, and that the defendant, who was a puisne judgment creditor, had become the purchaser; there were two prior judgments, and a mortgage on the estate; the defendant, at the desire of the mortgagee, took an assignment of the two first judgments; the mortgagee afterwards filed his bill to redeem and for an assignment of the two judgments; the defendant claimed interest for the principal and interest paid by him to the judgment creditors, and it was allowed.

If the Court allows time to the mortgagor or a puisne incumbrancer to redeem, it is but just and reasonable that they who take the advantage, should

(*a*) *Supra*, page 319.

(*b*) Earl of Macclesfield v. Fitton, 1 Vern. 168. Ashenhurst v. James, 3 Atk. 271. Porter v. Hubbart, 2 Rep. in Ch. 43.

(*c*) *Supra.*

bear the burthen, and therefore they shall pay interest on interest (*a*).

It is a general rule in equity, that tenant for life of an equity of redemption shall be compelled to keep down the interest accruing during the period of his being in possession (*b*), for which purpose the reversioner or remainder-man, may file his bill for relief (*c*); and if tenant for life suffer the interest to run in arrear, and die, the reversioner or remainder-man, may in equity call on his personal representatives to discharge the arrears. In a modern case (*d*), the mortgagee having permitted tenant for life to run in arrear, purchased the life estate, and the Court directed him to apply the surplus rent beyond the current interest towards liquidation of the arrears.

The tenant for life, however, is only answerable during the period of his possession, and, therefore, if there be tenant for life, with remainder over for life, under the same settlement, and the first tenant for life permit the interest to run in arrear, the second tenant for life shall not be compelled by the reversioner or remainder-man out of the rents to discharge the arrears (*e*).

(*a*) Neal v. the Attorney-General, Moseley, 247.

(*b*) Hungerford v. Hungerford, Gilb. Rep. Eq. 69. 5 Ves. Jun. 106.

(*c*) *Vide* Hayes v. Hayes, 1 Ch. Ca. 223.

(*d*) Lord Penrhyn v. Hughes, 5 Ves. Jun. 99.

(*e*) *Vide* 1 Ves. 95.

A careful distinction must, however, be drawn between the last-mentioned case and certain cases, with which it may be easily confounded. As for example:—If an estate be limited in strict settlement, *subject to a jointure created by a prior settlement*, and during the life of the jointress, the surplus rents are not sufficient to keep down the interest, so that it runs in arrear, and afterwards the jointress dies in the lifetime of the tenant for life, on which there arises a surplus rent beyond the current interest, the tenant for life must, during the continuance of his estate in the property, apply the surplus rent in reducing the arrears (*a*). In like manner, if an estate be limited to *A.* for life, with remainder (as to part) to *B.* for life, remainder (as to the whole) to *C.* for life, with power to *A.* to charge the estate with a sum of money, but not so as to incumber the life estate of *B.*, and *A.* charges the whole estate with a sum of money carrying interest, and dies, and then during the life of *B*, the estate of *C.* in possession is not sufficient to discharge the interest which runs in arrear; and afterwards *B.* dies in *C.*'s lifetime, *C.* will be compelled to apply the surplus rents of the whole estate towards liquidation of the arrears (*b*).

Tenant in tail in possession cannot be compelled to keep down the interest on a mortgage, because the reversioner and remainder-man are considered as

(*a*) Revel v. Watkinson, 1 Ves. 93.

(*b*) Tracey v. Hereford, 2 B. C. C. 128.

wholly in his power (*a*). But an exception to the rule arises if the tenant in tail is an *infant*, in which case the reasoning does not apply; and it is therefore decided, that the guardians or trustees of an infant tenant in tail, are bound to apply the rents in keeping down the interest; and if the guardian permits the interest to run in arrear during the infancy of the tenant in tail, an account of the rent and profits will be decreed after the infant's death (*b*). And even in the case of infant tenant in *fee*, the guardian is bound to keep down the interest of incumbrances out of the rents, and not increase the infant's personal estate at the expense of the real estate (*c*). If tenant in tail of full age keeps down the interest and dies, his personal representatives will not be creditor for the amount of interest paid, but the remainder-man, or reversioner will have the benefit (*d*); and in a case in which it appeared that a man being seised of lands in right of his wife, who was tenant in tail in possession subject to a subsisting mortgage, took in the mortgage, and during his wife's life was himself in receipt of the rents; the Court, after the wife's death, and on a bill filed by the reversioner to redeem, refused the husband interest on the mortgage during the period he had been in possession of the rents (*e*).

(*a*) Amesbury v. Brown, 1 Ves. 477. Chaplin v. Chaplin, 3 Pr. Wms. 235.

(*b*) Sargeson v. Cruise, *cited* 1 Ves. 477, 480.

(*c*) Jennings v. Locke, 2 Pr. Wms. 276.

(*d*) 1 Ves. 481.

(*e*) Amesbury v. Brown, *supra*.

A distinction has been taken, and is now well established in equity between an agreement, that the rate of interest shall be raised if not punctually paid, (which equity holds to be in the nature of *a penalty*, and to be relieved against, even in case of gross default (*a*)); and an agreement, that on punctual payment the interest shall abate, which latter agreement will be supported in equity, if strictly performed, *but not otherwise* (*b*).

An exception to the first-mentioned rule has been supposed to exist in case there is in the mortgage deed a direct *covenant* for payment of the increased rate of interest (*c*). The authority for this distinction is in a case in Vernon (*d*), in which the precise point certainly appears to have been decided, on the ground that the covenant being *the agreement* of the parties, was not to be relieved

(*a*) *Vide* Stanhope v. Manners, 2 Eden, 199. Lady Holles v. Wyse, 2 Vern. 289. Strode v. Parker, *ibid.* 316. Jory v. Cox, Pre. Ch. 160. Nicholls v. Maynard, 3 Atk. 519. Walmesley v. Booth, Barnard, 48. Bonafous v. Rybot, 3 Burr. 1375.

(*b*) *Vide* Jory v. Cox. Nicholls v. Maynard. Stanhope v. Manners, *supra*.

(*c*) *Vide* Powell, 962, 963.

(*d*) Marquis of Halifax v. Higgins, 2 Vern. 134. 1 Eq. Ca. Ab. 28.—Note, it is stated in Pre. in Ch. 161. that the agreement in Lord Halifax v. Higgins, was in a separate deed, and it has been queried whether that circumstance made a difference, *et vide* 15 Viner, 453. Powell, 963. But it is submitted, that the circumstance alluded to could not vary the case, as the instruments must be considered as forming one instrument.

against; a reason which does not seem to have much weight, since every proviso is in fact an agreement, and it may be considered, that the case of Halifax v. Higgins, has been overruled by the subsequent authorities (*a*).

An exception, however, must be made in case the increased rate of interest is the consideration *for forbearance* on the part of the creditor, and does not constitute part of the original agreement on the loan, in which case, if the compensation be reasonable, equity, it seems, will not interfere (*b*).

It is also proper to bear in mind, that the agreement for an abatement of interest, (although it must be strictly performed, and the breach of it cannot be relieved in equity) yet is not so closely regarded in the light of a condition, as to be utterly defeated by a single breach of it, if the language of the agreement will bear a different construction. Of this an instance is to be found in the case of Stanhope v. Manners (*c*), in which the agreement was, that *as often as* the interest should be paid half-yearly on the days appointed, or within three months next after, so

(*a*) *Et vide* 2 Eden, 199, note.

(*b*) Burton v. Slattery, 5 B. P. C. 68, 233. and Brown v. Barkham, 1 P. Wms. 652. 15 Viner, 453. *Et quære*, whether the note to 2 Eden, 199. is not incorrect in stating the case of Brown v. Barkham to be overruled.

(*c*) *Supra*.

much should be deducted as would make the interest three and a half *per cent.* The first half year's interest was not paid within the time. The tender of the second half year's interest (at three and a half *per cent.*) was made within the limited period, but was refused on the ground that the default made in the first half year defeazanced and annihilated the agreement. Lord Nottingham thought otherwise, and said, that words could not be stronger to express the intent of the parties, that *in every instance* where the three and a half *per cent.* was tendered *in time*, it should be accepted, and decreed accordingly.

Generally speaking, in order to stop payment of interest on mortgage, six calendar months' notice (*a*) by the mortgagor to the mortgagee, with proof of strict tender on the very day on which the six months expire, will be requisite; for if strict tender is not made, the Court cannot stop the interest (*b*).

The mortgagor should also, it is said, (*c*) be ready to make oath that the money has always been ready, and no profit made of it, which fact may be controverted by the mortgagee, who may prove the contrary, in which case the interest will run on (*d*).

(*a*) Sharpnell v. Blake, 2 Eq. Ca. Ab. 603.
(*b*) Bishop v. Church, 2 Ves. 371. *Et vide ibid.* 678.
(*c*) Lutton v. Rodd, 2 Ch. Ca. 206.
(*d*) Gyles v. Hall, 2 Pr. Wms. 378.

Lord Hardwicke has remarked (*a*), there is not one case in twenty upon the fact of an absolute refusal after a tender, that is ever made out, for they are generally attended with circumstances that explain the refusal. In the case then before him (*b*), a bill was brought to redeem a mortgage on the 8th of May, 1742, insisting on redemption on payment of principal money only,—and that interest ought to end on the 20th of February, 1741, on which day the six months' notice had expired, and on which day principal and interest, and a deed of assignment had been tendered and refused. The defendant alleged, there were covenants in the deed of assignment, on which he wished to advise with his solicitor. Lord Hardwicke said, the mortgagor's attorney should have left a copy or the ingrossment of the assignment with the mortgagee, that he might have had time to advise upon it; and the mortgagor's attorney should have appointed a time to pay the money after the mortgagee had been allowed a sufficient time to advise; and he directed the usual reference to the Master to take an account of principal, interest, and costs.

The debt being a sum in gross and collateral to the land, the tender must be made personally to the mortgagee, and it is not sufficient to make it on the land (*c*); but if there be a place of payment named in

(*a*) 3 Atk. 89.
(*b*) Wiltshire v. Smith, *ibid.*
(*c*) 5 Bac. Abr. 113.

the mortgage deed, although the place has reference to a strict payment according to the proviso in the deed, yet it seems, that notice of payment at that place will be sufficient in equity (*a*); and a tender at the house of the mortgagee has been held sufficient, although it did not appear that the mortgagee was then within doors, it being shewn that he had notice, the tender would be so made (*b*). And if a place be not named in the deed for payment of the money, yet if the mortgagor give notice of a reasonable place of payment, the tender has been held to bind the mortgagee (*c*).

If the right to the equity of redemption be in dispute (*d*), the tender will not stop the payment of interest. And if there be a mortgage from *A.* to *B.* for a sum certain, and an open account between the parties, with a balance due from *B.* to *A.*, a tender of the mortgage money, deducting the balance due on the account, will not stop the interest, nor prevent costs being allowed to the mortgagee (*e*).

On an account being settled between mortgagor and mortgagee, and all interest paid up to that day, and interest computed up to a future day, and a note given by the mortgagee to the mortgagor, promising

(*a*) Sharpnell v. Blake, *supra.*
(*b*) Manners v. Burgess, 1 Ch. Ca. 29.
(*c*) Gyles v. Hall, *supra.*
(*d*) Sharpnell v. Blake, *supra.*
(*e*) Garforth v. Bradley, 2 Ves. 678.

to re-convey on payment of principal and interest on such future day, it was held, that tender made on the day to the *executors* of the mortgagee, (who had died in the mean time,) although they had not proved the will, was sufficient to stop the interest (*a*). In this case the tender was made in a bank note, and the mortgagor offered, if the note was objected to, to turn it into money, which latter offer was held at all events to be a good tender. A mere tender of bank notes without such an offer might, perhaps, if objected to by the mortgagee, be held not sufficient to stop the interest (*b*).

In order to stop the payment of interest, the tender must, it is said, be made by one interested in the estate, and not by a stranger (*c*).

Interest is payable *de die in diem*, and must, therefore, be apportioned. The consequence is, that if tenant for life of a sum of money secured by mortgage die within a current half year, his executors will be entitled to the interest to the day of his death (*d*); but the public funds being in the nature of perpetual annuities and in the nature of rents, the dividends payable in respect thereof are not apportionable.

(*a*) Austen v. Executors of Dodwell, 1 Eq. Ca. Ab. 318.

(*b*) *Vide* Wright v. Reed, 3 Term Rep. 554. *Et supra*, page 15. *Sed quære?*

(*c*) Watkins v. Ashwick, Cro. Eliz. 132. Bac. Ab. Vol. 5. 118.

(*d*) Edwards v. Warwick, 2 Pr. Wms. 171. Wilson v. Harman, 2 Ves. 672.

In a modern case (*a*), a question arose, whether a devisee of an estate in mortgage was entitled to set off an arrear of interest due at the death of the mortgagor against the arrears of interest due on a legacy given by the mortgagee to the mortgagor for life, and not received by the mortgagor, who was one of the executors of the mortgagee; and it was decided, with some appearance of hardship, that he was not. The facts were, that one Richard King mortgaged his lands to Thomas Shurmer (his uncle), for 4000*l.* Shurmer, by his will, gave to trustees 7500*l.* In trust to invest it and pay the dividends to King (the mortgagor), for life, with remainder to his issue; and appointed King and the trustees executors. King by his will, after disposing of his personal estate subject to a provision for his debts, except debts due on mortgage, gave his real and leasehold estates to his cousin, John Pettat, for life, subject to such mortgages as should be due thereon at his decease; and he directed the interest thereon to be kept down by Pettat during his life, with remainder over. At the death of King, there was due to him for arrears of interest on the 7500*l.* a considerable sum of money; and there was due from him on the mortgage the whole of the mortgage money and interest. The bill was filed by the devisee of King against the surviving executor of Shurmer and the residuary legatee and executor of King, praying for an account of what was due from King at his death on the mortgage

(*a*) Pettat v. Ellis, 9 Ves. 563.

and to him for arrears of interest on the 7500*l.*; and that what was due on the latter account might be set off against the former, and that on payment of the balance he might be permitted to redeem. On the cause coming on to be heard, it was urged for the plaintiff, that the testator King had done no act signifying his intention that his dividends should not be applied to the liquidation of the interest of the mortgage, and that his permitting the dividends to remain, was equivalent to a declaration that they should be so applied, and it would prevent circuity of action. The Master of the Rolls allowed, that if the parties had settled accounts the day before King's death, the accounts must have been taken in the way the plaintiff intended, but it did not follow that the account after King's death was to be so taken. In our law, he observed, the debt still subsisted; and it is only by a process in our courts that the adjustment takes place, though by the civil law it operates *ipso jure*. Until that adjustment, the debts might be separately assigned, for they are not extinguished. He asked, what was the debt at the time of the death of King? Suppose he had sold the estate subject to the mortgage, could the vendee institute a suit to have an account such as this taken? His Honor then dismissed the bill against the residuary legatee and executor of King, and directed an account of what was due to the surviving executor of Shurmer for principal and interest, on payment of which the plaintiff was to be allowed to redeem.

Although it is a general rule, that interest on a

bond shall not go beyond the penalty (*a*), yet the rule does not apply in case the bond debt is also secured by a mortgage, even although the mortgage is given by a surety, and subsequently to the bond (*b*).

(*a*) Bromley v. Goodere, 1 Atk. 80. White v. Sealey, Doug. 49. Tew v. Lord Winterton, 3 B. C. C. 489. Knight v. Maclean, 1 B. C. C. 498. Mackworth v. Thomas, 5 Ves. 329. Clarke v. Seton, 6 Ves. 411. Wilde v. Clarkson, 6 T. R. 303., which overruled Lonsdale v. Church, 2 T. R. 388.

(*b*) Clarke v. Lord Abingdon, 17 Ves. 106. *Sed vide* Lloyd v. Hatchett, 2 Anstr. 524. Bac. Ab. 5. 156.

CHAPTER III.

Out of what Fund the Mortgage Debt shall be discharged.

A MORTGAGE is *a debt* by specialty (*a*). It follows from the known rules both of law and equity, that as between the real and personal representatives of the *debtor*, the personal estate is primarily liable to the payment of the debt, and must indemnify the real estate against it. All instances to the contrary are mere exceptions to this general rule; and whether the lands in mortgage devolve on the heir at law as *hæres natus* (*b*), or on a general devisee as *hæres factus* (*c*), or on a particular devisee (*d*), in either case the personal estate must, in the absence of evidence of intention to the contrary, become the primary fund, and exonerate the real estate, descended, or devised, from the debt.

To render the rule, however, applicable, the mortgage must be *the debt* of the party; if it is not *his*

(*a*) *Supra*, page 1.

(*b*) Cope v. Cope, 2 Salk. 449. Howel v. Price, 1 Pr. Wms. 292.

(*c*) Lutkins v. Leigh, For. 54. Galton v. Hancock, 2 Atk. 436.

(*d*) Pockley v. Pockley, 2 Ch. Ca. 84. 1 Vern. 36. Johnson v. Milksopp, 2 Vern. 112. *Et vide* 2 Atk. 436.

debt, there is no ground for the application of the rule. In a very recent case (*a*), a person seised of an estate subject to a mortgage created by himself, devised all his real and personal estate to his wife absolutely, and appointed her executrix. The residuary personal estate was more than sufficient to discharge the mortgage, which was, however, continued on the estate during the life of the widow, who died intestate, leaving her brother her heir at law. *Administration de bonis non* to the effects of the husband, and also administration to the effects of the wife, were granted to the defendants, against whom the brother filed his bill, claiming to be indemnified against the mortgage out of the personal estate of the husband. The Vice-Chancellor refused his claim, chiefly on the ground, that although the residuary personal estate of the husband had, by the will, become the property of the wife, yet the debt of her husband not having become *her* debt, *her* heir at law had no claim to be indemnified out of *her* personal estate against the debt of another person.

Although the debt be not originally the debt of the party, yet it is optional in him, by sufficient testimony of intention, to render the debt *his own*, in which case, the consequences before referred to will follow, that is, his personal estate will, as between his real and personal representatives, become primarily liable to discharge the debt.

(*a*) Scott v. Beecher, 5 Madd. 96.

The report books contain numerous cases founded on the distinctions before noticed; we shall divide our inquiry on this subject into two branches; first, into the cases in which no doubt has arisen as to the loan being the proper debt of the party, but the question has been whether the general rule before mentioned was under the circumstances applicable or not: and, secondly, into the cases in which no question was made as to the application of the rule, but the doubt has been whether the loan was the proper debt of the party.

As to the first branch of our inquiry.—It was formerly held, that if the loan was admitted to be the debt of the party, nothing short of an *express declaration* of intention to the contrary (*a*) would discharge the personal estate from being the primary fund for its discharge, and very able judges have regretted the rule was ever departed from (*b*). It is however now decided, that the intention of the party to exempt the personal estate from the *onus* of being the primary fund for the payment of his debts, may be evinced not only by direct declaration, but also by *implication plain* (*c*). It is manifest, this decision was opening the door to litigation; but at the same time it must be admitted,

(*a*) Fereyes v. Robinson, Bunb. 301. *Et vide* Duke of Ancaster v. Mayer, 1 B. C. C. 462. and Bootle v. Blundell, 1 Mer. 216.

(*b*) *Vide* Watson v. Brickwood, 9 Ves. 453. Bootle v. Blundell, Ancaster v. Mayer, *supra*.

(*c*) *Ubi supra*.

that it does not seem easy to advance any substantial reason wherefore equity should refuse its assistance in the one case rather than in the other; for a *direct* declaration is nothing more than an indication of intention, and if such an intention be indicated on the face of the instrument, although not in direct terms, yet a refusal of the aid of equity would apparently be a sacrifice of the rights of parties to a mere form of words.

It has been also urged (*a*), that, admitting an indidication plain to be sufficient, yet the intention must be so manifest as to be clear to any person of plain and ordinary capacity, not possessed of technical legal knowledge. This, however, was denied by Lord Eldon, who concurred in opinion with the Master of the Rolls, in Brummel v. Prothero (*b*), that the indication of intention will be sufficient if it satisfies the mind of the judge deciding upon the case (*c*).

It is evident that cases of the kind under consideration must greatly depend on the particular circumstances of each individual instance, and it is difficult to extract from them any general principles for our guide in other instances.

(*a*) *Vide* Arguments of Counsel in Bootle v. Blundell, 1 Mer. 207, 208.

(*b*) 3 Ves. 113.

(*c*) Bootle v. Blundell, *supra*.

In some of the earlier cases, evidence *dehors* the will was received to shew the testator's intention (*a*). But on this point Lord Eldon has expressed his clear opinion (*b*), that with regard to circumstances *dehors* the will, which have been sometimes called in to assist in explaining it, such as the respective amount of the real and personal estate, the greater or less degree of personal favor which the testator may be presumed to have entertained towards this or that object of his bounty, and others of that nature, they ought all to be set aside in the consideration of a question depending on a will, such a question being fit to be decided only by an *examination of the whole will taken together.*

It may be deduced from the adjudged cases, that it is not sufficient for a testator to shew an intention to *charge his real estate* with the payment of his debts, whether by a trust for sale, limiting a term, or simply charging the estate; he must shew an intention to *exempt his personal estate* (*c*). In this, a distinc-

(*a*) Bamfield v. Windham, Pre. Ch. 101. *Vide* Stapleton v. Colville, For. 202.

(*b*) 1 Mer. 216. *et vide* Lord Inchiquin v. French, 1 Cox. 9 Amb. 33. 1 Wils. 88. Andrews v. Emmot, 2 B. C. C. 303.

(*c*) Dolman v. Smith, Pre. Ch. 456. French v. Chichester, 2 Vern. 568. Stapleton v. Colville, For. 202. Haslewood v. Pope, 3 P. Wms. 325. Fereyes v. Robinson, Bunb. 302. Walker v. Jackson, 2 Atk. 625. Bridgman v. Dove, 3 Atk. 202. Inchiquin v. French, *supra.* Samwell v. Wake, 1 B. C. C. 144. Aldridge v. Lord Wallscourt, 1 Ball & Beatty, 312. Watson v. Brickwood, 9 Ves. 447. Tait v. Northwick, 4 Ves. 816. Tower v. Lord Rous, 18 Ves. 132. Bootle v. Blundell, *supra.*

tion may arise in the case of a testator directing a particular debt to be paid out of a particular portion of the real estate, a circumstance affording, as the late Master of the Rolls observed, a very different inference from a devise to sell for payment of all debts, which evinces nothing more than an intention that all the debts shall be paid, and the real estate, if that is necessary, applied, but will not exonerate the personal estate (*a*).

Lord Eldon has justly observed (*b*), that on a comparison of all the cases that have arisen on the subject, it is scarcely possible to find any two in which the Court altogether agrees with itself, there being scarcely a single circumstance that is considered in one case as a ground of inference in favor of the intention that has not been considered in other cases as against the same inference: As particular circumstances have, however, been allowed by different judges to have more or less weight in inducing their inference of the testator's intention to exempt his personal estate from the payment of his debts, it will be necessary for us to advert to the leading features of the decided cases on this subject.

The strongest inference *against* the claim of ex-

(*a*) Hancox v. Abbey, 11 Ves. 186. *Et vide* Walker v. Pink, cited 1 Cox. 5.

(*b*) 1 Mer. 219.

emption of the personal estate, appears to be the circumstance of its falling to the *executor* for his benefit, *virtute officii* (*a*), or in an instance of the gift of the personal estate to the executor as a legacy, and the appointment of him to be executor, being in one and the same sentence(*b*); but the converse of the proposition above stated, *i. e.* the gift of the legacy, and the appointment of the legatee to be executor, being in distinct sentences, will not of itself afford an inference for the exemption of the personal estate (*c*). Cases are, however, to be found, in which the executor has been held to take the personal estate, or residue of personal estate, as a specific legacy exempt from the payment of debts.

In one particular case (*d*), a decision to that effect was made by Lord Hardwicke, which has not received the approbation of succeeding judges. In that instance a testator willed that all his estate in the county of Lincoln should be sold as soon as his executrixes conveniently could, for payment of his

(*a*) Grey v. Grey, 1 Ch. Ca. 296. Mead v. Hide, 2 Vern. 120. Gray v. Minnethorpe, 3 Ves. Jun. 106.

(*b*) Cutler v. Coxeter, 2 Vern. 302. Barton v. Barton, *ibid.* 308. White v. White, 2 Vern. 43. Anon. 2 Vent. 349. Noke v. Darby, 3 B. P. C. 290. French v. Chichester, 2 Vern. 568. Bromhall v. Wilbraham, For. 274.

(*c*) Hall v. Brooker, Gilb. Rep. 73.

(*d*) Walker v. Jackson, 2 Atk. 624.

lawful debts and legacies, and funeral expenses; and after giving several legacies, he appointed Emma Marshal and Dorothy Dupre, joint executrixes, but made no express disposition of the residue of his personal estate. By a codicil he gave to his executrixes all his personal estate not before devised. Lord Hardwicke held they took the personal estate exempt from debts, on the ground of the direct bequest to the executrixes: a circumstance which, Lord Thurlow observed, has been considered by other judges as affording a contrary conclusion (*a*); and in which conclusion, Lord Northington, in Stephenson v. Heathcote (*b*), and Lord Eldon, in Bootle v. Blundell (*c*), seem to have coincided.

The circumstance of the *same persons* being appointed trustees and executors has had considerable weight in inducing judges to draw an inference that the personal estate is not to be exempted (*d*); and Lord Alvanley has remarked (*e*), that the circumstance of the trustees not being the executors, affords a strong inference as to the real intention, and is al-

(*a*) Ancaster v. Mayer, *supra*.

(*b*) Cited 1 B. C. C. 458.

(*c*) 1 Mer. 223.

(*d*) Dolman v. Smith, Prec. in Ch. 456. *Et vide* Stephenson v. Heathcote, cited 1 B. C. C. 458. Ancaster v. Mayer, *supra*. Bootle v. Blundell, 1 Mer. 230.

(*e*) 3 Ves. 108.

ways favorable to the exemption of the personal estate.

The gift of the *whole personal estate* has been considered as favorable to the inference of the bequest being intended to be exempt from the payment of debts; and evidence *dehors* the will has in some of the early cases been admitted to shew that the fund, if applied in payment of debts, would be exhausted (*a*).

A bequest of a *residue* has always been considered unfavorable to the claim of exemption (*b*). But a distinction has been drawn in cases in which the residue has been immediately preceded by an enumeration of specific articles, not likely to be intended by the testator to be sold (*c*); and also in cases in which the residue has been considered as not meaning the residue after satisfaction of debts, &c., but the residue of the personal estate before specifically bequeathed (*d*); and in all cases in which, from cir-

(*a*) Bamfield v. Wyndham, Prec. Ch. 101. Wainwright v. Bendlowes, 2 Vern. 718. Kynaston v. Kynaston, cited 1 B. C. C. 457. Heath v. Heath, 2 P. Wms. 366.

(*b*) Lord Inchiquin v. French, 1 Cox. 1. Philips v. Philips, 2 B. C. C. 293. Stephenson v. Heathcote, cited 1 B. C. C. 458.

(*c*) Adams v. Meyrick, 1 Eq. Ca. Ab. 271. Braidnox v. Gratwich, cited 3 P. Wms. 325.

(*d*) Attorney-General v. Barkham, cited For. 206. Adams v. Meyrick, *supra*. Anderton v. Cook, cited 1 B. C. C. 456. Waise v. Whitfield, 2 Eq. Ca. Ab. 374. Walker v. Jackson, 2 Atk. 624. Stapleton v. Colville, For. 201.

cumstances, it can be considered as specific, it will be exempted.

The circumstance of the possession of the real and personal estate accruing to one and the same person, *i. e.* of the real estate charged with debts being limited in strict settlement, and the personal estate being given to the same person who is entitled to the possession of the real, so that the personal estate is made to accrue to the real, has been differently considered by different judges. The better opinion is, that as a testator could not intend that his *settled* family estate should be burthened with debts, and his personal estate be given away, discharged from debts, to be squandered and dissipated, he must have meant that his personal estate should not be exempt (*a*).

If a trust for sale is created out and out, and the general personal estate is left to devolve on the *executor*, the legatee of the surplus money to arise from the sale of the devised estate has a right to call on the general fund for its indemnity (*b*); but if the general personal fund is given to a stranger, the presumption of intention will incline in favor of its exemption (*c*).

(*a*) Dolman v. Smith, Pr. Ch. 456. Haslewood v. Pope, 3 P. Wms. 323. Harewood v. Child, cited For. 204.

(*b*) Gray v. Minnethorpe, 3 Ves. 103.

(*c*) Wainwright v. Bendlowes, Pre. Ch. 451. Webb v. Jones, 2 B. C. C. 60. Holliday v. Bowman, cited 1 B. C. C. 145.

It seems that the omission to charge *funeral expenses* on the real estate, is a circumstance of some weight, to shew that the personal estate is not to be exempt, because funeral expenses are the first charge on that fund (*a*), and also because it shews that the testator intends the personal estate to be charged beyond the particular legacies or charges mentioned in the will, and being once broken in upon, the argument of its being specific is destroyed (*b*).

Several modern cases on this subject having occurred, it may be proper to notice the particular circumstances attending each.

In the case of Burton v. Knowlton (*c*), the real estate was devised to two trustees upon trust to sell, and thereout pay all mortgages and incumbrances, and all other debts and funeral expenses, and invest the residue in stock, and pay the rents and profits of the lands unsold, and the annual income of the money arising from the sale, after payment of debts, to J. Welch for life, and after his decease to convey and assign the real estate and the produce thereof not sold or applied, to the heirs or heir at law of William Cockell. The Executrix then bequeathed several specific and pecuniary legacies, and gave £200 to be

(*a*) Burton v. Knowlton, 3 Ves. 107.
(*b*) *Vide* Brydges v. Philips, *infra*.
(*c*) *Supra*

paid by the trustees after the decease of J. Welch, as he should appoint; and all the rest and residue of her personal estate, not before specifically bequeathed, she gave to J. Welch, in trust *as she should appoint*, and in default of appointment, in trust for himself, and she appointed him *executor*. She died without making any appointment, and the Master of the Rolls decided the personal estate *was exempt*.

In a case (*a*) decided nearly at the same time and by the same judge, the real estate was devised to a trustee, in trust, in the first place, *to pay all the testator's debts* and subject thereto, in strict settlement; and he gave *all* his personal estate to his brother, E. Blewitt, who was one of the devisees of the real estate; and appointed him executor. It was decided the personal estate was *not exempt*.

In Tait v. Lord Northwick (*b*), the testator devised all his newly purchased real estate to trustees, upon the trust declared by certain indentures of conveyance of other estates for the payment of particular debts, and subject to such trusts then in trust to sell and pay all other debts whatsoever, and subject thereto to the like uses as were declared in the indentures of the other estates. He gave a pecuniary legacy to his executors, and bequeathed all the rest and residue of his personal estate to his two sisters, and appointed two of the trustees

(*a*) Brummel v. Protheroe, 3 Ves. 111.
(*b*) 4 Ves. 816.

executors. It was decided the personal estate was *not exempt.*

In a subsequent case(*a*), the will commenced with a direction that all the testator's just debts and funeral and testamentary expenses should *in the first place* be paid, which direction was of itself sufficient to charge the real estate subsequently devised (*b*). The testator then gave certain specific legacies, and devised and bequeathed all his messuages and lands, and monies in the funds to William and Henry Hartley, their heirs, executors, &c., in trust, out of the rents, dividends, &c. to pay all his just debts and funeral and testamentary expenses, and the several legacies thereinafter mentioned. He then gave certain pecuniary legacies, and an annuity of 300*l.* to be paid out of the rents and dividends to his wife for life, and the residue of the rents and dividends he directed should be paid to his daughter, until his grand-daughter attained twenty-one, or married: and then he directed the trustees out of the rents and dividends, to pay his grand-daughter 300*l.* a year, for her life, and to pay the residue to his daughter for life, and after her decease he gave and devised all his said messuages and lands and monies in the funds to his grand-daughter, her heirs, executors, &c. He then directed that his leasehold estate should not be sold, and all the rest and residue of his real and personal

(*a*) Hartley v. Hurle, 5 Ves. 540.

(*b*) Williams v. Chitty, 3 Ves. Jun. 545. Shallcross v. Finden, *ibid*, 738. King v. Denison, 1 V. and B. 274, *et vide*. Keeling v. Brown, 5 Ves. 359.

estate, not by him otherwise given or disposed of, he gave to his daughter, her heirs, executors, &c., and appointed her, with the trustees, executors. It was held the personal estate given to the daughter was *not exempt.*

In the case of Brydges v. Phillips (*a*), the testator devised all his real estates not included in his marriage settlement, or which had not since been purchased by him, to trustees, upon trust to sell, and thereout pay all his just debts, (except a mortgage on part of the premises, and a sum of 4000*l.* for his two sisters, charged on his settled estates,) and in the next place pay a legacy of 1000*l.* to his half sister, with lawful interest from the decease of the testator's father, and to pay a legacy of 4000*l.* to his wife, and all the residue of his said unsettled estates, and also all his settled estate, in case there should be a failure of his issue male, he devised to his wife for life, with remainders over. He then bequeathed part of his personal estate as heir-looms, and gave to his father an annuity, which he charged on his unsettled estates. He then gave several pecuniary legacies, all which he directed should be paid out of his personal estate, (except the part given for heir-looms,) and all the rest and residue of his personal estate, except as aforesaid, he gave to his wife, whom he appointed executrix with the trustees. An observation made by the Master of the Rolls in this case, is deserv-

(*a*) 6 Ves. Jun. 567.

ing attention, *viz.* that legacies having no existence but by the will, must come out of the fund the testator points out; but debts have a separate and independent existence. He also noticed there being no provision made for *funeral expenses* out of the real estate, on which however he did not seem to put much stress, but said, he thought the omission had of late had full as much weight as was due to it.—" Perhaps it is true," he remarked, " as has been stated from Lord Hardwicke, that it is more a phrase of form, than indicating a settled intention, and that either the insertion or omission of it means little. But (he continued) it is argued, that wherever the personal estate is taken to be exempted (whether the whole personal estate, or the residue after charges) it is taken as a *specific* legacy; and, if it is once broken in upon, how is it liable to one charge and not to another? You oppose the construction that it is subject only to particular legacies, by shewing there is something else that must come out of it. In that way the argument is applied from the omission to provide for funeral expenses, and that is the only way in which it has application; for I do not think there is much inference from it as to the intention." He ultimately decided the personal estate was *not exempt.* The Master of the Rolls noticed in this case, that the trustees and executors were not *wholly* the same persons; where they have been the same, he remarked, that circumstance has been used against the exoneration. In this will, he observed, two of the executors are trustees; but then the wife is added.

In Watson v. Brickwood (*a*), a testator devised his freehold and some renewable leasehold estates to W. St. Quintin, his heirs, executors, &c. to certain uses in strict settlement; he then gave to his nieces several legacies in blank, and directed them to be paid at the end of twelve months after his decease by his executor. He then bequeathed to his nephew William Wood, (who was *the first tenant for life of the real estate,)* all his personal estate, he paying thereout all legacies, funeral expenses, and simple contract debts; and reciting that he had, at different times, borrowed money on mortgage and bond to enable him to purchase part of the estates, and being minded that the whole should be discharged in equal proportions by the tenants for life, as they should respectively become entitled to his estates, he directed that so much as each tenant for life in possession should discharge, and their respective expenses in protecting his leasehold estates, and a due proportion of any of the two last fines for renewal of the leases, should be a debt and charge against the whole of such estate in favour of such person: and he directed, the next taker of the estates to repay such sums of money as his predecessor should have so paid off, deducting the due share of such preceding taker; and the same course to be used by each of the takers in succession, before such next taker could have any benefit under his will; and he appointed William Wood sole executor. By a codicil, the tes-

(*a*) 9 Ves. Jun. 447.

tator appointed John Birkwood trustee of his will, in the place of St. Quintin, and authorized him, in order to raise money for payment of *all* his debts and legacies, to mortgage a competent part of the settled estates. The executor contended the personal estate was exonerated from the debts, or at least subject only to the simple contract debts. But the Master of the Rolls held there was *no exoneration* of the personal estate.

In Hancox v. Abbey (*a*), the testator devised his real estate to trustees, upon trust, to sell so much as would be necessary for discharging a mortgage debt due on part of his estate, and for raising the sum of 2000*l.* for his two daughters, and subject thereto, in trust, for his wife for life, with remainder to his two daughters in fee; and after giving some pecuniary legacies, he bequeathed the residue of his personal estate not otherwise disposed of (after payment of all his just debts, legacies, and funeral expenses), to his wife absolutely, and appointed her and the trustee executors. The question was, whether the mortgage debt and the legacy of 2000*l.* were payable out of the personal estate. The Master of the Rolls was clear that the legacy was specifically charged on the estate. As to the mortgage, he admitted, that a devise to sell for payment of all debts was not an exoneration of the personal estate, for it shewed nothing more than an intention, that all the debts should be

(*a*) 11 Ves. Jun. 179.

paid, and that the real estate, if necessary, should be applied for that purpose; but a direction to apply a particular portion of the real estate for the payment of one particular debt afforded a very different inference, and he decreed that the personal estate ought to be *exempted*.

In the case of Aldridge v. Lord Wallscourt (*a*), the facts simply were, that the testator devised his lands (subject to his debts, funeral expenses, and the portions afterwards charged for his daughters and granddaughters), to trustees on certain trusts, and after limiting the estate to several persons, he directed the trustees, by sale or mortgage, or out of the rents of his lands, to raise the portions therein mentioned, and appointed his son executor, and bequeathed to him all his personal estate for such purpose as the testator should appoint; and by a codicil he appointed the personal estate to one of his daughters absolutely. It was contended the personal estate was exempted from payment of debts; but Lord Chancellor Manners decreed the personal estate was the primary fund.

In Tower v. Lord Rous (*b*), a testator devised his real estate (subject to such mortgages and other incumbrances as affected the same, and to the payment of his debts and legacies), to trustees for 1000 years, in trust, to raise 1000*l.* for his eldest daughter

(*a*) 1 Ball v. Beatty, 312. *Sed vide* Burton v. Knowlton, *supra*.
(*b*) 18 Ves. Jun. 132.

and to sell certain parts of his real estate, in order to pay off and discharge the mortgages and incumbrances on any of his estates, and all his debts (*a*), and legacies, and subject to the term of 1000 years, to his first and other sons in strict settlement; and after giving a pecuniary, and some specific legacies, he bequeathed the residue of his personal estate to such one of his sons as should be his eldest son at the time of his decease, and entitled to the possession of the estates under the will. By a codicil he gave part of his personal estate as heir looms, and by another codicil he gave certain pecuniary legacies. The eldest son claimed the residue of the personal estate not specifically bequeathed, discharged from debts and legacies. The Master of the Rolls observed, it was admitted the funeral and testamentary expenses must be paid out of the personal estate, affording the inference, that the testator did not mean to give his personal estate as a specific bequest; and he decreed the personal estate was *not exempt.* In this case, the Master of the Rolls is reported to have observed, that the circumstance of the residuary legatee being the first taker of the real estate, had been sometimes held a ground for *exempting the personal estate;* we have however seen, that the circumstance alluded has generally produced a contrary effect, in which light it was considered by Lord Eldon in the case we are about to notice.

(*a*) *Vide* Hancox v. Abbey, *supra;* and note the difference.

In Bootle v. Blundell (*a*), many of the circumstances concurred which had passed under consideration in the prior cases. The will commenced with general directions that the testator's funeral expenses should be paid. He then gave to his son and two daughters, legacies of 3000*l.* each; and directed that his *funeral expenses*, and the said legacies should be paid out of such monies as he should have by him at the time of his death at Ince or in the Liverpool Bank, or should be due to him from the corporation of Liverpool, and out of such rents and fines as should be then due to him; and he gave the surplus of that fund to his said son and two daughters. He then devised certain estates, at Lostock, to trustees, for five hundred years, upon trust, *out of the rents and profits*, to raise money for payments of *debts*, and all such annuities and legacies as were thereafter mentioned; and amongst the rest 300*l.* to his trustees; and he *charged* the expences of his trustees and executors on those estates; and subject to the term, devised those estates to his two daughters, in undivided moieties, in strict settlement; and gave out of the rents a legacy of 300*l.* to any future trustees. He then devised his Lydiate estate to his son for life, with remainders over in strict settlement, and gave his pictures, statues, and marbles, as heir-looms, to go with the last mentioned estates; but he requested that no servant might be allowed to take any perquisite for shewing them. He gave his housekeeper

(*a*) 1 Mer. 193.

certain specific articles, which he directed to be removed at the expense of his personal estate; and then gave to his son the furniture of his house, his wines, horses, cattle, and carriages, plate, and other his goods and chattels, and personal estate, *not thereinbefore by him specifically disposed of*, or which might be thereafter disposed of by him, and appointed the trustees executors. By a codicil, he devised to the same trustees a term of 1000 years in the Lydiate estate, in trust, to raise any sums of money they might expend in supporting the will.

By a decree made by the Lord Chancellor, in April 1815, the legacies of 3000*l.*, and the *funeral expenses* were declared to be specific charges on the monies at Ince, or in the Liverpool Bank at the testator's death, or due to him from the corporation of Liverpool, or for rents or fines, and that the surplus of that fund was a *specific bequest* to the son and two daughters: That the bequest of furniture, &c., and other personal estate, not specifically disposed of, was not to be considered a specific bequest to the son of those several articles, but formed part of the general residue; and that the personal estate, not specifically disposed of, was the primary fund for payment of debts, and the term of five hundred years an auxiliary fund, to make good the deficiency. It was now moved, that the minutes should be altered, by declaring the term of five hundred years the primary fund, in exoneration of the personal estate.

All the circumstances in the case were separately

considered by the Chancellor. He first remarked on the same persons being *trustees and executors*, which had been called by some judges a circumstance shewing the intention not to exempt the personal estate; but his Lordship said, that, on the contrary, whether it was or was not such a circumstance, depended entirely upon the context; and if he could discover through the whole will an anxious discrimination between the two characters in which they were to take; if he could trace an extreme caution, that all their costs contained in the character of executors were to be paid to them, not as executors, but as trustees of the real estate, then he must conclude, that in a will so constituted, the inference of intention arising out of the union of character failed by reason of a stronger inference of a contrary intention. He next remarked, that some judges had considered a direction that the *funeral expenses* should be paid out of the real estate, a strong circumstance to exonerate the personal, because it was not reasonable to suppose the testator could have meant to exempt it from that which is the primary charge upon it, and yet leave it subject, in all other respects, to the natural course of law, while other judges had professed not to see much in that argument, and that the circumstance went no further in meaning, than it did in words, to create a fund for one particular class of expenditure. All these supposed positive inferences then, observed his Lordship, amount to no more than this, that the same expressions used in one will, may have a totally different effect from what they would have in another.

His Lordship then went through a review of the cases, and observed, that the cases of Stephenson v. Heathcote, and Ancaster v. Mayer, furnish the concurrent opinion of Lord Northington and Lord Thurlow, that if in the first of those two cases, the wife had *not been appointed executrix*, she would have taken the personal estate *exempt* from the payment of debts. He also expressed his opinion, that the case of Watson v. Brickwood was rightly decided, taking the will and codicil together.

He then considered the facts of the principal case, and remarked, that it was observable the testator throughout the will never used the term *executors* but with reference to his personal, nor the term *trustees* but with reference to his real estates.

He next noticed the fact of the funeral expenses being directed to be paid out of a specific fund, although, generally speaking, the personal estate constituted a primary fund for such purpose. He then adverted to the trusts of the term of five hundred years, viz. out of the *rents and profits* to pay debts, and the legacies thereinafter given, observing, that the legacies to the *executors* could only be payable out of the real estate, a circumstance worthy of particular attention. He then noticed, that it was evident the legacies were to be raised forthwith, and not out of annual rents, and it was a fair inference, he contended, by making a provision for debts and legacies in one clause, they should be both paid in the same way.

He then adverted to the clause charging the costs of *his trustees and executors* on the Lostock estate, and remarked, that the expenses incurred by them in the performance of the trusts of the real estate, could not be charged on the personal estate; and that from the case of both real and personal estates being blended, it was a strong argument the testator intended the whole should be a charge on the devised estate, in exoneration of the personal.

He afterwards observed on the legacy of 300*l.* to *future trustees*, from which it might be inferred, that the legacies to the *trustees and executors* were given to them in the capacity of trustees.

He then remarked on the gift of the pictures, &c., as heir-looms, and observed that the view with which the clause was introduced, viz. the keeping them together as public curiosities, sufficiently accounted for their being set aside from the rest of the personal estate, without resorting to the supposition that it was merely to exempt them from the payment of debts and legacies, to which it would then follow of course the remainder of the personal estate was meant to be liable.

He then considered the directions in the will that the costs of removing some of the specific legacies should be borne out of the personal estate, but said, it did not thence follow, as had been argued, that the personal estate was to be subject beyond that charge to the payment of debts and legacies.

He then proceeded to the clauses giving to the son the personal estate, not specifically disposed of.

He first noticed the distinction taken by his predecessors, between a residue given simply, or following an enumeration of articles constituting items of such a description as to render it improbable the testator meant them to be applied in payment of debts, which he thought was a circumstance deserving of just so much weight, and no more, as any individual judge could consider it fairly entitled to: He also noticed the circumstance of the residuary legatee being also tenant for life of the devised estates, with remainder over to his children, which had been considered as a reason why it could *not* be intended he should take the personal estate, exempted from debts, which circumstance his lordship thought must depend for its weight on a consideration of the whole will, for after all, he observed, the question was not what the testator really meant, (which could never be ascertained) but what he had authorized the Court to say probably was his meaning. He then observed on the words "not hereinbefore specifically bequeathed," which at first occurred to him as excluding the idea of this being a specific bequest; but that inference was not a necessary one, for the expression might mean "not specifically bequeathed to others." He then remarked on the 1000 years' term for securing the costs of his trustees and executors in supporting the will; And on all these grounds declared, that after all the attention he had been able to give the case, he

felt convinced the testator did *not* intend his personal estate *to be subject to debts.*

The cases we have been considering (*a*) will evince the difficulty, as before observed, of drawing any general rules to guide our judgment in questions which arise relative to the exemption of the personal from its liability to exonerate the real estate from debts. The ground taken by Lord Eldon seems to be this, that although certain circumstances; such as the trustees and the executors being the same, or being distinct persons; the bequest of the personal estate being entire, or as a residue; and, if the latter, its following immediately an enumeration of specific articles not likely to be intended by the testator to be sold or the like, may have more or less weight on the mind of the judge deciding the question; yet the presumption arising from all or any of such circumstances, whether for or against the exemption of the personal estate, is open to be rebutted by an attentive consideration of the contents of the whole will; and that no particular circumstances of themselves are of such sufficient force as imperiously to require our admission of the intention of the testator, without being subject to be explained or rebutted by other parts of the will. The evidence of such intention is, however, in all cases, to be gathered from

(*a*) See also 1 Eden. 47, note, where all the cases on this subject are collected.

the will itself, and not from circumstances *dehors* the will.

In applying the principle of the primary liability of the personal estate for the payment of debts to the particular case of mortgage, it is necessary to remark, that it will not prevail to the prejudice of legatees, whether specific (*a*) or pecuniary (*b*), and much less to the prejudice of creditors (*c*), and it is decided, that the paraphernalia of the widow is also exempted (*d*). The rule is, in fact, applicable between the heir and devisee on the one hand, and the executor or administrator and residuary legatees, or next of kin, on the other, but not as between other parties; and therefore, if the mortgage creditor resorts to the personal estate, and by such means exhausts the fund, the other creditors and the legatees will have relief in equity on the real estate in mortgage, or, in other words, equity will marshal the assets for their benefit.

The mortgage will be payable out of the personal estate in preference to the customary or orphanage part by the custom of London (*e*), and to the

(*a*) O'Neale v. Mead, 1 P. Wms. 693.
(*b*) Davis v. Gardner, 2 P. Wms. 190. Rider v. Wager, *ibid.* 335.
(*c*) Bartholomew v. May, 1 Atk. 487.
(*d*) Tipping v. Tipping, 1 P. Wms. 730.
(*e*) Ball v. Ball. Cited in Rider v. Wager, *supra.*

widows' customary moiety in the province of York (*a*).

After the personal estate is exhausted, it is necessary to consider in what order the *real estate* may be applicable for the discharge of mortgage debts.

In the case of Serle v. St. Eloy (*b*), a man seised of lands in fee *part of which* were in mortgage, devised his lands in mortgage to his niece (an infant), in fee, *subject to the incumbrances thereon.* He then devised other lands to his brother in fee, *subject to the payment of debts,* and he devised the residue of his real and personal estate to Mr. St. Eloy, *in trust to sell and thereout pay his debts* and legacies, and should any of his debts remain unpaid, he charged the same on the estate devised to his brother, and appointed Mr. St. Eloy his executor.

The infant, by her bill, submitted to pay off the mortgage. The Master of the Rolls said, that the devise of the estate in mortgage, *subject to the incumbrance,* was no more than what was implied, for the testator could not do it otherwise; but when the testator devised other estates to pay his debts, this must be intended *all his debts,* and consequently the debt by mortgage was part of those debts which were to be paid off out of the money arising by sale of the trust estate,

(*a*) Pockley v. Pockley, 1 Vern. 36.
(*b*) 2 P. Wms. 386.

and he ordered the plaintiff to amend her bill. On the amended bill coming on to be heard, the Master of the Rolls declared, that the debts and legacies were to be paid out of the personal estate, and out of the real estates devised to *St. Eloy and the testator's brother*, and that the mortgage debt was to be taken as one of those debts. Against this decree, the brother appealed, but the judgment was affirmed by Lord Chancellor King.

By this case several important points were determined; first, that the devisee of an estate in mortgage has a right to call on an *estate devised for payment of debts*, to indemnify him (*a*). Secondly, that he has a like claim on estates devised *charged* with the payment of debts. And thirdly, that it does not lessen his equity, if the estate in mortgage be devised *subject to incumbrances*.

In a subsequent case before Lord Hardwicke (*b*), all the points appear to have arisen which occurred in Serle v. St. Eloy, and the like decree was made.

A question next arose (*c*) between the devisee of the estate in mortgage and the *heir at law*, in respect of an estate descended. A testator devised his real

(*a*) *Et vide* Tweedale v. Coventry, 1 B. C. C. 240. Bateman v. Bateman, 1 Atk. 421. Howell v. Price, 1 P. Wms. 291.

(*b*) Bartholomew v. May, 1 Atk. 487.

(*c*) Galton v. Hancock, 2 Atk. 424—427.

estate to his wife in fee; he afterwards purchased other estates, which descended on his heir at law: the devised estate was in mortgage, and the question was, whether the descended estates should be applied in exoneration of the devised estate. At the first hearing of the cause Lord Hardwicke thought the devisee must take *cum onere*. On a rehearing his lordship adjourned the case to look into entries of judgments at law on the statute of fraudulent devises, and for precedents in equity, where there were specialty debts and mortgaged estates devised. After a twelvemonth's delay he gave an elaborate judgment. He first observed, that at common law the heir could not have called on a devisee even to contribute towards the payment of specialties. He then considered the effect of the statute of fraudulent devises, and came to the conclusion, that this statute was passed for the benefit of creditors, and not in favour of heirs at law. He next noticed the decisions in favour of the devisee of the mortgaged estate as against the personalty; and afterwards adverted to the case of Serle v. St. Eloy, as being the nearest in point to the present case. He then reversed his former decree *in toto*, and directed an account to be taken of the real estate descended upon the heir, which was to be applied in exoneration of the devised estate. By this case a fourth point was decided, *viz.* that the estate *descended* should exonerate the *mortgaged estate devised*. And the like will be the case, if the testator exempts his personal estate from the

payment of debts and devises his mortaged estates *subject to incumbrances*, and permits other part of his real estate to descend on his heir at law (*a*).

The last mentioned rule applies as between the devisee of the mortgaged estate and the heir at law: but a distinction was taken by Lord Hardwicke in Powis v. Corbet (*b*), in favor of the heir at law, in case part of the real estate be *expressly* devised for the payment of debts. In that case part of the estates had descended on the heir at law, and other parts were devised to trustees for a term of five hundred years, *in trust for payment of debts*, with remainders over, and it was determined, that a particular trust being created out of particular lands for the payment of debts, that fund must be first applied before the *descended* estate could be liable. This decision has been supported by subsequent cases (*c*). The consequence is, that after the personal estate is exhausted, estates expressly devised for payment of debts will be next applicable.

The last mentioned distinction, however, will not apply to estates specifically devised *charged* with the payment of debts. This was decided in the case of Davies v. Topp (*d*). In that case the testator being seised of real estate subject to a mortgage, by his will charged all his real and personal estates with

(*a*) Barnewall v. Lord Cawdor, 3 Madd. 453.

(*b*) 3 Atk. 556.

(*c*) Davies v. Topp. Donne v. Lewis. Manning v. Spooner, *infra*.

(*d*) 1 B. C. C. 524.

the payment of debts; subject to which he devised his real estates in strict settlement. He *afterwards* purchased a freehold estate, which, on his death, descended on his heir. The bill was for an account and for the application of the personal estate in a due course of administration, and to have the deficiency raised out of the real estate. The cause was first heard at the Rolls, when the Master directed that the deficiency of the personal estate for payment of the mortgage and other specialties, should, in the first place, be made good out of the estates descended. The heir at law appealed to the Lord Chancellor. For the devisee, the case of Galton v. Hancock was cited. For the heir at law, the case of Powis v. Corbet. On the hearing of the cause, Lord Thurlow said, it was impossible to distinguish the case from Galton v. Hancock (*a*); the first fund for the payment of debts was the personal estate; the second fund might be estates devised for payment of debts; and the third fund, estates descended, but estates *particularly devised* were never applied till all the other funds were exhausted. And he affirmed the decree.

A similar decision had been made in a prior case (*b*), but the point does not appear to have been raised by the pleadings.

In the case of Donne v. Lewis (*c*), a review was

(*a*) *Supra*, p. 485.
(*b*) Wride v. Clarke, cited 2 B. C. C. 261.
(*c*) 2 B. C C. 257.

made by Lord Thurlow of the preceding decisions. In that case, the testator gave all his real and personal estate, (except the estates afterwards specifically devised,) to trustees, in trust to pay debts, &c. and declared, that if the fund so provided should not be sufficient, then he charged the deficiency on the estates given to his three sons and two daughters, and directed that one-fifth with interest at *5l. per cent.* should be borne by each. He afterwards purchased a small freehold estate, and the question was raised, whether the descended estate should be applied in preference to the estate specifically devised. The Chancellor first remarked, that if the case of Galton v. Hancock were more recent, he should not perfectly agree that there ought to be the distinction which appeared to have been taken in Davies v. Topp, and Wride v. Clarke, between a general charge created by general introductory words, and a charge created by the most express and specific words that could be used for subjecting property to the payment of debts. He next noticed a distinction taken in Powis v. Corbet, between an estate in the testator's possession at the time of making his will, and which he permits to descend on his heir at law, and a subsequently acquired estate, a circumstance which he did not think substantial enough to raise a distinction in a case where you must hold the subject matter as a thing quite out of the scope of the testator's intention. He then stated the order of payment as in Davies v. Topp, *viz.* 1st, The general personal estate. 2ndly, Ordinarily speaking, the estates devised for payment of debts. 3rdly, Estates descended. 4thly, Estates

specifically devised, even though they are generally charged with the payment of debts. He then referred to the decided cases, and said "the question will always be, *are the terms of the will only a general indication that the testator means to subject his property to his debts, or does he mean more, and to make a particular provision for them?* In the principal case, he thought the latter was the testator's intention, and accordingly decided that the devised estates were to be first applied.

In the more recent case of Manning v. Spooner (*a*), the descended estate was purchased subsequently to the will, which contained a devise of estates in the West Indies to trustees in fee in trust to manage, &c. and out of the profits to pay certain annuities, and in the next place to apply the profits in payment of debts so far as his personal estate should be deficient, and subject to those trusts, to uses in strict settlement. For the devisees it was urged, that the circumstance of the descended estate being purchased after the date of the will was material to shew the testator's intention, that it was not to be exempt. For the heir at law, it was argued, that the inference from the circumstance of the will not being republished, was as strong in favor of the heir as if the descended estate had been purchased at the date of the will. The Master of the Rolls adverted to the doctrine laid down by Lord Thurlow in Donne v. Lewis as before stated, and decided that the descended estate could not be applied until the appro-

(*a*) 3 Ves. 114.

priated estate was exhausted; but the arrangement could not affect the rights of creditors.

The decided cases have therefore now determined that there are four classes of estates to be applied in discharge of mortgage debts: first, the general personal estate, unless specially exempted: secondly, estates particularly devised for payment of debts: thirdly, estates descended, whether purchased before or after the date of the will: and fourthly, estates specifically devised, charged with the payment of debts.

We must next proceed to the second branch of our inquiry, viz. the cases on which no question has been made as to the application of the general rule, that the personal estate is the primary fund for the payment of the mortgage debt; but the doubt has been whether the loan was the proper debt of the party. Of this, an instance has been already given in the recent case of Scott v. Beecher (*a*).

First: in the case of a *purchaser*. If a man purchase an estate subject to an existing mortgage, the debt does not, without more, become *his* debt, so as to render him personally liable to the mortgagee; the land remains the proper fund for its discharge; and it will require clear evidence of intention on the part of the purchaser to make the debt *his own*, so as to render his personal estate the primary fund for payment.

(*a*) *Supra*, page 458.

Now every person purchasing an estate in mortgage is bound to indemnify the vendor against the mortgage debt (*a*), and as a covenant by the purchaser with the vendor for the payment of the debt is no more than a covenant of indemnity, it consequently is no indication of intention on the part of the purchaser that his personal estate shall become the primary fund for its discharge (*b*); nor under such a covenant is the purchaser or his executor liable to an action at law by the mortgagee (*c*); and if the purchaser, by his will, create a trust or charge for the payment of his *debts*, it will not (under such circumstance) include the mortgage debt (*d*). If, however, a purchaser *borrow* a sum of money to enable him to complete his contract, and the estate is on the purchase limited to the lender either for a term of years, or in fee by way of mortgage, the debt is the proper debt of the purchaser, and his personal estate will be primarily liable, even although part of the money borrowed be applied in discharge of an existing mortgage (*e*). If such be not the purchaser's intention, he should insert in the deed of mortgage a declaration, that as between his real and personal representatives the land shall be the primary fund, and his personal estate an auxiliary fund for payment of the mortgage debt;

(*a*) *Vide* 7 Ves. 336.

(*b*) Tweddell v. Tweddell, 2 B. C. C. 101.

(*c*) *Ibid.* Forester v. Leigh, Amb. 171. Butler v. Butler, 5 Ves. 534.

(*d*) Ancaster v. Mayer, 1 B. C. C. 454. Butler v. Butler, *supra*.

(*e*) Waring v. Ward, 5 Ves. 670, 7 Ves. 332.

but that such agreement is not to prejudice the rights of the mortgagee.

A distinction is said to exist between the case of a man contracting to purchase a mere equity of redemption, and a contract for the purchase of an estate for a given sum, of which the mortgage debt forms part, and which, on the purchase, is discounted out of the consideration money; in which latter case, it is considered, the personal estate of the purchaser will be the primary fund. For this, the case of Parsons v. Freeman (*a*) is cited as an authority, in which a man contracted to pay 90*l.* for an estate, *viz.* to pay 86*l.* to the mortgagee, and 4*l.* to the vendor. Lord Hardwicke held the personal estate was primarily liable, on two grounds; first, because there was an express contract to pay, and the representative of the mortgagor might maintain an action for the money, and so might the mortgagee oblige the mortgagor to let him make use of his name to recover the money (*b*). Secondly, it being agreed to be *part of the purchase-money*, the heir would (if there was nothing more in the case) be entitled to have the money paid out of the personal estate, as where one articles to purchase an estate, and dies before the purchase is completed (*c*). This distinction however appears rather refined. The argument

(*a*) Amb. 115. 2 P. Wms. 664, note. Belvidere v. Rochfort, 5 B. P. C. 299.

(*b*) Cope v. Cope, 2 Salk. 449.

(*c*) *Et vide* Cope v. Cope, *supra*.

drawn from the right of the heir at law in the latter case, to call on the personal estate to pay the whole purchase-money, in case the purchaser dies without completing the contract, does not seem to be very strong, for it is a simple question of evidence of *intention:* now if the purchaser dies without completing the contract, having agreed for the purchase of the *whole estate*, it may be fairly contended on the part of the heir, that his ancestor's intention was to pay off the mortgage, and purchase the entire estate, and therefore he may reasonably call on the personal estate to discharge the mortgage in his favour. But if the purchaser himself completes the contract, permitting the mortgage to remain, then the weight of evidence of intention is exactly the reverse; and one would think should lead to precisely different conclusions. As to the express contract to pay the whole sum, that agreement *has been manifestly* varied by the acts of the parties qualified to do so. To prevent, however, any doubt, the purchaser should (if such be his intention) make a declaration similar to that before recommended in the instance of his *borrowing* money to pay off the mortgage.

Another point of considerable magnitude arises in our consideration of this branch of our subject, *viz.* supposing the purchase to be of a mere equity of redemption, what degree of evidence will be sufficient to indicate the purchaser's intention to make the debt his own? We have seen that, generally speaking, a covenant with the vendor for payment of the debt will not have that effect, it being no more than a co-

venant of indemnity. In a more recent case, however, a covenant of that nature was, with other circumstances of rather a peculiar nature, held sufficient for the purpose (*a*). The facts were, that Richard Huntingford and wife being tenants for life, and their son John, being tenant in remainder in fee of certain lands, they all joined in a demise to a mortgagee for a term of years to secure a sum of money raised for the benefit of John. The father and John covenanted for payment of the mortgage debt. A further sum was afterwards advanced, for the payment of which they also covenanted. Consequently both father and son became liable to an action at law by the mortgagee for the money. The interest being greatly in arrear, John agreed to convey his remainder in fee to his father, on the latter indemnifying him against the debt, which was accordingly done. The father afterwards borrowed a further sum, and made a fresh mortgage for the whole debt. Under these special circumstances, the Master of the Rolls decided that Richard Huntingford had made the debt his own, and consequently his personal estate was the primary fund for discharge of it.

In the last mentioned case it will be observed that there was not only a covenant of indemnity from the father to the son, but the former was actually liable on his covenant at law to the mortgagee, and he afterwards entered into a *fresh agreement* altogether with the mortgagee for the payment of the original

(*a*) Woods v. Huntingford, 3 Ves. 128.

debt, and of the further sum advanced. On the latter principle, viz. of the agreement between the purchaser and the mortgagee being *de novo*, the case of the Earl of Oxford v. Lady Rodney (*a*), appears to be decided. In that instance, one Nicholl being possessed of the equity of redemption in a house in Harley Street, sold the equity of redemption to Lord Oxford, in consideration of 1360*l.*, subject to a mortgage of 2100*l.* to Mr. Wilbraham. Wilbraham was a party to the conveyance, and covenanted that if Lord Oxford paid the 2100*l.* with interest, on certain days and in certain proportions *mentioned in the purchase deed*, he would re-assign the premises; and Lord Oxford covenanted that he would pay the debt accordingly. It was held that Lord Oxford's personal estate was the primary fund. In another modern case (*b*), the circumstances were more special than in Lord Oxford v. Lady Rodney. An estate was sold by order of the Court of Chancery to Mr. Waring for 32,000*l.* The estates were in mortgage for 17,800*l.* The purchaser paid 12,000*l.* into Court, and borrowed 20,000*l.* from Sir R. Cunliffe, which was also paid into Court. The mortgage debt was then paid off out of the fund in Court, and all the parties concurred in a conveyance to Sir R. Cunliffe in fee, subject to redemption. It was contended that the land was the primary fund for the amount of the money borrowed or at least of the money paid in discharge of the original mortgage,

(*a*) 14 Ves. Jun. 417.

(*b*) Waring v. Ward, 5 Ves. 670. 7 Ves. 332.

but the Court decided that the whole debt should be paid out of the personal estate of the purchaser, on the ground that the transaction was a personal contract between Waring and Cunliffe.

It is suggested that these cases do not bear out the doctrine, that if the purchaser by *any communication* with the mortgagee take the debt upon himself so as to give the mortgagee a right to sue him for the mortgage debt at law, he will be considered to have made the debt his own; and that as between his real and personal representative, his real estate will be only the auxiliary fund for payment. All the three cases of Woods v. Huntingford, Waring v. Ward, and Lord Oxford v. Lady Rodney, had strong circumstances evidencing the purchaser's intention to consider the debt his own, but it is submitted, that it yet remains to be decided, that a mere covenant by a purchaser with the mortgagee to pay the debt, without any alteration of the time of payment or any other variation of the original contract, will operate to render the personal estate of the purchaser the primary fund.

Secondly: in the case of an *heir at law or devisee.*

If an estate descend on an heir at law (*a*), or be devised (*b*), charged with a mortgage debt, and the

(*a*) Cope v. Cope, 2 Salk. 449. 1 Eq. Ca. Ab. 270. Evelyn v. Evelyn, 2 P. Wms. 664.

(*b*) Perkins v. Bayntun, 2 P. Wms. 664, note. Shafto v. Shafto. Basset v. Perceval, *Ibid.* Scott v. Beecher, 5 Madd. 96.

heir or devisee die leaving the mortgage debt unpaid, the land will be the fund for the payment of the debt. Of this the before-mentioned case of Scott v. Beecher (*a*) is a strong instance, for, in that case, the devisee was also the sole legatee, and the personal estate of the mortgagor after payment of debts, &c. was sufficient to have discharged the mortgage; and yet on a bill filed by the heir at law of the devisee against the administrator of the devisee, to be indemnified out of the personal assets of the mortgagor, his claim was refused. The case of Scott v. Beecher seems to have been decided on sound legal principles, and brings into question a position in Gilbert Lex. Præt. 315, viz. that if father be heir and executor to grandfather, and the grandfather leave assets to the value of the mortgage debt, and the father convert the assets to his own use, the father's personal estate to the amount of the assets converted will be liable to the payment of the grandfather's debt, and the grandson may, in such case, come upon his father's executors to that extent, to exonerate the mortgage out of the father's personal estate. It is submitted that the grandson would have no more equity in the case put than the heir of the devisee in Scott v. Beecher. The case of the Earl of Belvidere v. Rochfort (*b*) certainly appears to support the position in Gilbert, but in Tweddell v. Tweddell (*c*), Lord Thurlow expressed his dissent from that deci-

(*a*) *Supra*, p. 458.
(*b*) 5 B. P. C. 299.
(*c*) 2 B. C. C. 107.

sion, and many different reasons being stated for affirming the decree appealed against, the case does not seem to have been much relied on as an authority (*a*). In another case in which part of a testator's real estate was, by Act of Parliament, expressly set aside for the payment of the testator's debts, and the heir disposed of that fund, and converted the money to his own benefit, his personal estate was held primarily liable to the payment of the debts (*b*).

In matters of this sort, the question is confined to evidence of *intention;* and therefore, as on transfer or assignment of the mortgage, the concurrence of the heir or devisee in the deed, and his personal covenant for payment of the money, is only by way of additional security to the mortgagee, the burthen of the debt will not, as between the real and personal representatives, be altered (*c*). The same principle applies if other estates are added to the security, on a further sum being lent (*d*), or if there be a covenant on his part for increasing the rate of interest (*e*); and it seems that if the sums borrowed by the heir or devisee, and added to the original mortgage, be comparatively small, equity will not consider that he had different intentions as to the different sums, but will

(*a*) *Vide* 2 B. C. C. 105.

(*b*) Effingham v. Napier, 5 B. P. C. 221. 2 P. Wms. 664. note.

(*c*) Bagot v. Oughton, 1 P. Wms. 347. Evelyn v. Evelyn, 2 P. Wms. 659. Leman v. Newnham, 1 Ves. 51, *et vide* 7 Ves. 336.

(*d*) Ancaster v. Mayer, 1 B. C. C. 454. 464.

(*e*) Shafto v. Shafto, 1 Cox, 207. 2 P. Wms. 664, note.

charge the real estate with the whole (*a*). It is perhaps unnecessary to add, that the latter doctrine must be received with much caution. In a case before Lord Northington (*b*) his lordship is said to have given an opinion that if, on a transfer of mortgage, *a new equity of redemption* is created, the personal estate of the heir will, on his death, become the primary fund. But this opinion seems to be at variance with several well-considered cases, and must, it is submitted, be confined to instances in which, from the circumstances attending the case, an evidence of such an *intention* can be collected.

The same rule applies to the heir or devisee as to a purchaser (*c*), *viz.* that a charge by his will of debts generally on his real and *personal* estate will not of itself be sufficient to shift the onus from the mortgaged estate (*d*).

Even a direct and original mortgage made by the heir or devisee will not operate to render his personal estate the primary fund, if the money borrowed is for the purpose of paying off the debts (*e*) or lega-

(*a*) Lewis v. Nangle, Amb. 150. 2 P. Wms. 664, note.

(*b*) Donisthorpe v. Porter, 1 Eden, 162. Amb. 600.

(*c*) *Supra*, page 491.

(*d*) Lawson v. Hudson, 1 B. C. C. 58. 3 B. P. C. 424. Hamilton v. Worley, 2 Ves. jun. 62. 4 B. C. C. 199. Leman v. Newnham, 1 Ves. 51. Butler v. Butler, 5 Ves. 534. Ancaster v. Mayer, *supra*.

(*e*) Tankerville v. Fawcett, 1 Cox, 237. 2 B. C. C. 57. Perkyns v. Bayntun, 2 P. Wms. 664. note.

cies (*a*) of the ancestor or devisor, and the like will be the case if the heir or devisee give his bond (*b*) or note of hand (*c*) for payment of debts or legacies charged on the land.

Thirdly: in the case of a *surety*.

In many instances, persons are concurring parties in a mortgage, or assignment of mortgage, in the character of *sureties*. For instance, if a man having a power to charge an estate with a sum of money, raise it by way of mortgage, and on an assignment of the mortgage the person then entitled to the estate is a party, and gives his personal covenant for payment (*d*); the covenant will operate as an auxiliary security only, and the land must bear the onus: or, if a person having an estate in lands, concur in a mortgage with some other party having also an estate in the lands, for the purpose of raising a sum of money for the benefit of the latter, he is merely a surety, and may require to have the estate exonerated out of the assets of the other party; and it is said, if he enter into no covenant, that he will not be personally liable to

(*a*) Basset v. Perceval, 1 Cox, 268. 2 P. Wms. 664, note. Mattheson v. Hardwick, 2 P. Wms. 665, 5th edit. Billinghurst v. Walker, 2 B. C. C. 604. Hamilton v. Worley, *supra*.

(*b*) Billinghurst v. Walker, *supra*. Basset v. Percival, *supra*.

(*c*) Mattheson v. Hardwick, *supra*.

(*d*) Evelyn v. Evelyn, 2 P. Wms. 664; *et vide* Lechmere v. Charlton, 15 Ves. 193.

the mortgagee either by way of specialty or simple contract (*a*).

On the principle of suretyship rest the cases in which it has been decided, that if a settlor covenant for payment of children's portion, or widow's jointure (*b*), or if a person make a voluntary gift by way of charge, and covenant for payment of the money (*c*), the land must be the primary fund for payment.

A very distinct class of cases has arisen in the consideration of mortgages by husband and wife, of the estate of the latter; the question in those cases being, whether the estate of the husband was, under the circumstances of each case, bound to indemnify the estate of the wife against the mortgage. The distinctions taken in this branch of the law are clear and satisfactory.

First: the general principle is, that if the money be raised for the benefit of the husband, the wife or her heir will be a creditor in the place of the mortgagee, on his estate to the amount of the debt dis-

(*a*) Lloyd v. Thursby, 2 Cru. Dig. 163, 2d edit., *sed quære* as to the latter.

(*b*) Lanoy v. Duke of Athol, 2 Atk. 444. Edwards v. Freeman, 2 P. Wms. 438. Coventry v. Coventry, 2 P. Wms. 222, *et vide* Lucy v. Gardner, Bunb. 137.

(*c*) Wilson v. Darlington, 1 Cox, 172. 2 P. Wms. 664, note.

charged out of her estate (*a*); and will have preference to all legatees of the husband (*b*), but will be postponed to all his creditors (*c*), who however, on the other hand, will not, it seems, in case the mortgagee resort to the husband's estate, have a right to stand in his place as creditor on the estate of the wife (*d*).

Secondly: parol evidence is admissible, to shew for whose benefit the money was raised (*e*).

Thirdly: if it be raised by the husband to pay off debts of his wife incurred *dum sola*, the wife's estate must bear the burthen (*f*); and the like, it seems, will be the case, if the principal part of the money raised is applied for such purpose, and the residue retained by the husband for his own benefit (*g*), because the mortgage being a single transaction, the Court will suppose the intention of the parties to be uniform, and that such intention was to charge the wife's estate with the whole debt.

(*a*) Huntingdon v. Huntingdon, 2 Vern. 436. 2 B. P. C. 1. Pocock v. Lee, 2 Vern. 604. Tate v. Austin, 1 P. Wms. 264. Parteriche v. Powlett, 2 Atk. 384. Astley v. Tankerville, 3 B. C. C. 545. Lacam v. Mertins, 1 Ves. 313. Clinton v. Hooper, 1 Ves. Jun. 173. 3 B. C. C. 201.

(*b*) Tate v. Austin, *supra*.

(*c*) *Ibid.*

(*d*) Robinson v Gee, 1 Ves. 252.

(*e*) Clinton v. Hooper, 1 Ves. Jun. 173. Kinnoul v. Money, cited 1 Ves. Jun. 186. 3 B. C. C. 212, 3.

(*f*) Lewis v. Nangle. Amb. 150. 1 Cox, 240. Bagot v. Oughton, 1 P. Wms. 347.

(*g*) Lewis v. Nangle, *supra*.

Fourthly: if the wife or her heir after the husband's death promise to relinquish their claim, parol evidence is admissible of such agreement. But, it seems, that evidence will not be received of a declaration on the part of the wife that the money was intended by her as a *gift* to her husband contrary to the express language of the deed (*a*).

Fifthly: the claim of the wife will not be waived by her covenant after her husband's death, that the estate shall stand charged with the original debt, and also with a further sum advanced to her (*b*).

Sixthly: the husband will have a right to be indemnified out of the estate of the wife, if on a transfer of a mortgage charged on the wife's estate, he enter into a covenant, or give bond for its payment (*c*); and if, at the time of an original mortgage of the wife's estate, he make a provision out of his own estate for his wife's benefit, he may, under the circumstances, be considered as a purchaser of the money raised by the mortgage (*d*).

It was recommended by the Court in a case before referred to (*e*), that in instances in which it is the wife's intention that the money raised shall be a gift

(*a*) Clinton v. Hooper, 1 Ves. Jun. 188. 3 B. C. C. 201.
(*b*) Lacam v. Mertins, 1 Ves. 312.
(*c*) Bagot v. Oughton, 1 P. Wms. 347.
(*d*) Lewis v. Nangle, Amb. 150. 1 Cox. 240.
(*e*) Clinton v. Hooper, *supra*.

to her husband, the estate should be vested in trustees, upon trust by sale or mortgage to raise the sum proposed: and it is there said that supposing a conveyance to be so made, it is manifest the debt could never be the debt of the husband, but a sum of money to which he would have an original right without any obligation ever to repay.

If a mortgagor become bankrupt before payment of the mortgage debt, the mortgagee may pray a sale under the general order of the 8th March 1794 (*a*), and prove for the deficiency (*b*); or he may throw up his securities on the bankrupt's estate, and prove his debt generally (*c*), without prejudice to his claim on any surety for the debt (*d*); but having made his election to give up his securities, he cannot afterwards retract (*e*); and if he prove for the residue, he cannot charge interest beyond the date of the commission (*f*). He may also (if he have a mortgage for the retransfer of stock) prove under the commission, the value of the stock at the date of the commission, and the amount of dividends due prior to the commission (*g*); and if a commission be taken out prior to the time for repayment of the money secured by mortgage, and the mortgagee have

(*a*) *Vide* Appendix, No. 6.

(*b*) *Ex parte* Bennett, 2 Atk. 528. *Ex parte* Fisher, 3 Madd.; and see General Order, *supra*.

(*c*) *Ex parte* Grove, 1 Atk. 105.

(*d*) *Ex parte* Bennet, *supra*. *Ex parte* Wildman, 1 Atk. 109.

(*e*) *Ex parte* Downes, 18 Ves. 290.

(*f*) *Ex parte* Badger, 14 Ves. 165.

(*g*) *Ex parte* Day, 7 Ves. 301.

also a bond for the debt, of which any breach has been committed in the payment of interest, he may prove for the whole debt (*a*).

In the case of Carter v. Barnardiston (*b*), it was held that if one seised of Whiteacre and Blackacre mortgage the former, and then by his will charge all his real estates with the payment of his debts, and devise Whiteacre to *A.*, and Blackacre to *B.*, the devisee of the former shall compel the devisee of the latter to contribute. On the like principle, if both estates had been comprized in the mortgage, and had been devised to different persons, they should have contributed (*c*): the same would be the case if the estates in mortgage were freehold and copyhold, and descended to different heirs (*d*); and if the estates be of equal value, they will contribute equally (*e*).

It has been already mentioned (*f*) that the general rule of equity is, that a person having two funds to which he may resort, shall not disappoint another person who can resort to one only of the funds (*g*). This rule is frequently applicable in cases of mort-

(*a*) *Ex parte* Fisher, *supra*.

(*b*) 1 P. Wms. 506.

(*c*) Aldrich v. Cooper, 8 Ves. 390, 391.

(*d*) *Ibid.*

(*e*) 8 Ves. 391, *et vide* Henningham v. Henningham, 2 Vern. 355. 1 Eq. Ca. Ab. 117.

(*f*) *Supra*, page 254.

(*g*) *Et vide* Aldrich v. Cooper, 8 Ves. 391. Trimmer v. Bayne, 9 Ves. 209. Attorney-General v. Tyndall, Amb. 614. Lanoy v. Duke of Athol, 2 Atk. 444.

gage, of which several instances are put by Lord Eldon in Aldrich v. Cooper. Thus in the case of two distinct estates being mortgaged to one person, and one only of the estates to another person, in order that the latter may not be disappointed, equity will compel the former to have recourse to the fund which can be affected by him only, although the estates descend to different heirs (*a*): and this equity has been applied in favor of a mortgagee whose interest in an estate was affected by an extent of the crown, even in a question with general creditors; and he was held entitled to stand in the place of the crown as to those securities which he could not affect *per directum*, because the crown had affected those in pledge to him (*b*). In like manner, if a man die having no fund except a freehold and a copyhold estate, both comprehended in a mortgage to *A.*, but the freehold estate only being mortgaged to *B.*, *with covenant or bond* (*c*); in that case the mortgagee of both estates might, if he thought proper, apply to the freehold estate, and exhaust the whole value of it; the other would then stand as a naked specialty creditor. There is, however, no doubt that the latter being both a specialty creditor and a mortgagee of the freehold estate, but not having any claim as a mortgagee upon the copyhold estate, the same arrangements would take place; and that in equity, the second mortgagee would throw the prior incumbrancer upon the estate, to which the second had no resort.

(*a*) 2 Atk. 444.

(*b*) *Et vide* Sagitary v. Hyde, 1 Vern. 455.

(*c*) *Vide infra*, page 505.

In the preceding case of Aldrich v. Cooper, it was debated whether the case of Robinson v. Tong(*a*), could be maintained, viz. that specialty creditors had no right to insist that a mortgage debt, secured both on freeholds and copyholds, should be thrown on the copyholds, so as to leave the specialty creditors the freehold fund; on the ground that copyholds were not assets for specialty debts, and that none of the rules of equity subject any fund to a claim to which it was not before subject, but only take care that the election of one claimant shall not prejudice the claims of others. Lord Eldon justly observed that it was clear the case was by no means a due application of the principle, for the copyholds, as well as the freeholds, were both subject to the mortgage debt; and as to copyholds not being assets for specialty debts, was freehold estate, he asked, assets for simple contract debts? It was not, either in law or equity. Upon what principle then did the Court say that in given cases, simple contract debts should be paid out of the real estate? Not upon the ground of assets, but that a specialty creditor has a double fund to resort to. Upon the like principle, the Court, in that case, directed (if it were necessary for the payment of the creditors) that the mortgagee should take his satisfaction out of the copyhold estate, and that if he took it out of the freehold, those who were thereby disappointed, should stand in his place as to the copyhold estate; thereby overruling the case of Robinson v. Tong.

The case of Aldrich v. Cooper also decided, that if

(*a*) Stated in Mr. Cox's note to P. Wms. Vol. I 680, 5th edit.

freeholds are conveyed in mortgage, with a covenant "for better securing the payment of the debt," to procure admission to certain copyholds, and surrender them to the mortgagee, and in the mean time to stand seised of the copyhold estate in trust for him, both freeholds and copyholds are *primarily* mortgaged, and both equally liable to the mortgage debt.

It may be here proper to remark that although in two preceding instances in this work (*a*), a mortgage has been defined to be a *debt by specialty*, yet if the deed contain no covenant for payment of the debt, and the mortgagee have not a bond in which the heir is named, the mortgagee will have no claim on the heir beyond his security on the land in mortgage (*b*); and, consequently, if a preceding mortgagee should exhaust the land, he would, in such case, be reduced to a simple contract creditor, unless the proviso for redemption (if such be contained in the deed) could, in his favor, be considered as amounting to an agreement under seal on the part of the mortgagor and his heirs, to pay the mortgage debt. How far such a construction might be put on the proviso, does not appear to have been considered. From the principle of marshalling before stated, it follows that if a mortgagee with bond or covenant resort to the personal estate, the simple contract creditors will have a right to stand in his place (*c*), to the amount of the sum taken by the mortgagee out of the personal estate (*d*).

(*a*) Pages 1, 457.

(*b*) *Vide* 8 Ves. Jun. 394.

(*c*) 8 Ves. 394. Galton v. Hancock, 2 Atk. 436.

(*d*) *Vide* note Wilson v. Fielding, 2 Vern. 763.

CHAPTER IV.

Of Foreclosure.

EQUITY having determined that the mortgaged debt shall be considered the principal, and the land a pledge, and, as a consequence, that the mortgagor, notwithstanding his breach of condition and the consequent forfeiture at law of his estate, shall be relievable in equity, on payment of principal, interest, and costs, and the mortgagee in possession accountable for the rents and profits, it became, on the other hand, just that the mortgagee should not be subject to a perpetual account, nor converted into a perpetual bailiff, but that, after a fair and reasonable time given to the mortgagor to discharge the debt, he should lose his equity, or in other words, be foreclosed his right of redemption. On this principle rests the doctrine of foreclosure, which we are about to consider, and in the application of which the forbearance of equity, on behalf of the mortgagor, seems to be carried to its utmost limits, even so far as in some instances, to work a serious detriment to the mortgagee; for we shall find that equity is ready to receive the excuses of the mortgagor, as well for the purpose of giving him time to procure the money previously to the foreclosure (*a*), as also

(*a*) See the case of Edwards v. Cunliffe, 1 Madd. 287. in which the period for payment was enlarged the fourth time.

for the purpose of opening the foreclosure after many years' quiet possession by the mortgagee, under an absolute decree of foreclosure confirmed, signed, and enrolled.

The usual course pursued on foreclosure is, for the mortgagee to file his bill, praying that an account may be taken of principal and interest, and that the defendant may be decreed to pay the same with costs by a short day, to be appointed by the Court, and in default thereof, he may be foreclosed his equity of redemption. On the answer coming in, the matter is referred to one of the Masters to take the account, and a decree is made for payment of principal, interest, and costs, within six calendar months (*a*) after the Master's report of what is due on that account, or in default, the mortgagor shall stand foreclosed. After the account has been taken, the Master makes his report, and appoints a day for payment; the report is confirmed, and, on default made, the mortgagee may obtain an absolute order for foreclosing (*b*): the order is afterwards signed and enrolled, and the foreclosure is complete.

In Ireland it is the practice, instead of a foreclosure, to pray that the estate may be sold, and the monies applied in satisfaction of the incumbrances, and the surplus paid to the mortgagor (*c*). If there

(*a*) *Vide* 2 Eq. Ca. Ab. 605.
(*b*) Senhouse v. Earl, 2 Ves. 450.
(*c*) 13 Ves. Jun. 205.

is a deficiency, the mortgagee has his remedy for the difference.

In certain instances also in England a decree for a sale instead of foreclosure may be obtained, as, if the mortgage be of a dry reversion (*a*), or if the heir of the mortgagor be an infant (*b*); in which latter case, a foreclosure or sale in the alternative should be prayed, and if a foreclosure alone is prayed, the Court will, with the mortgagee's consent, refer it to the Master, to inquire whether it will not be for the infant's benefit that a sale should be made (*c*). It also seems, that if the bill for foreclosure be taken *pro confesso*, the Court will order a sale (*d*); and if one of the executors of the mortgagee be himself the mortgagor, the bill by the co-executors should be for a sale (*e*). If the mortgagor die, and the heir and executor be the same person who, by his answer, admits the personal estate deficient for payment of debts, a sale may be obtained in the first instance, without a reference for an account of the personal estate (*f*).

In the last mentioned case, Lord Thurlow is reported to have said, that if the heir and executor had been different persons, an account of the personal estate must have been first taken; from which Mr.

(*a*) How v. Vigures, 1 Ch. Rep. 33. Vin. 15. 475.

(*b*) Booth v. Rich, 1 Vern. 295. 15 Vin. 475.

(*c*) Mondey v. Mondey, 1 V. and B. 223, *vide contra* Goodier v. Ashton, 18 Ves. 83, overruled by Mondey v. Mondey.

(*d*) Dashwood v. Bithazey, Mosely, 196.

(*e*) Lucas v. Seale, 2 Atk. 56.

(*f*) Daniel v. Skipworth, 2 B. C. C. 155.

Powell inferred generally (*a*), that if a mortgagor die, and his personal estate prove deficient to discharge the mortgage, the mortgagee may, on filing a bill to enforce payment of the money due, pray a sale of the mortgaged estate in the first instance. The case certainly appears to warrant this conclusion. A recent writer (*b*) seems to think that in any case in which a mortgage security is *deficient*, a sale may be prayed; and gives as a reason, that to pray a foreclosure, which the next day is liable to be opened, (that is, by the mortgagee proceeding at law on his other securities, as will be hereafter noticed,) is a mode of relief to which equity would not confine a *bonâ fide* mortgagee. This however, it is submitted, is very different from the case put by Lord Thurlow, where you have both the heir and executor before the Court, and the personal estate is become the primary fund for payment of the debt, which, on an account, proves to be deficient. The order for sale in such case, may be very properly made, especially if the mortgagee have the further security of a bond or covenant, making him a specialty creditor. But it is submitted, there is no authority for the general doctrine, that on an alleged deficiency of the mortgage security, a sale may, in the first instance, be prayed. How is it to be ascertained, that the security is deficient as the foundation for the decree for sale? As to the argument, that equity will not hold a mortgagee

(*a*) Powell on Mortgage, 1094, 4th edit.
(*b*) Patch on Mortgage, 426.

to a mode of relief liable to be the next day defeated, it may be answered, that if the mortgagee suspect his security to be deficient, he may, in the first instance, proceed against the mortgagor on his collateral securities, and file his bill for the deficiency. It is true that in Dashwood v. Bithazey (*a*), the Master of the Rolls said, that where the security was *defective*, it was often referred to the Master to set a valuation on the estate, and the plaintiff was to take it *pro tanto*, as in the case of Homden v. Tilby, on a bill of foreclosure of the shops in Westminster Hall. But this observation seems to apply to a *defective*, and not a deficient security. Mr. Fonblanque (*b*), referring to the doubt hereafter stated, whether equity will restrain a mortgagee from proceeding on his bond after foreclosure and sale, observes, "the safer course is for the mortgagee to pray a sale; but note, he cannot pray a sale, without previously praying a foreclosure." The author is not aware of any direct decision on the point.

Although equity, after default by the mortgagor in payment of the debt, will give the mortgagee relief by foreclosure, and in certain instances by sale, as before mentioned, yet the Court, in accordance with its principle of considering the estate a pledge, will grant the mortgagor every fair allowance of time to enable him to discharge the debt. The time for payment may be, therefore, renewed, on proper application to the Court, even after the decree is

(*a*) Moseley, 196.

(*b*) Treat. on Equity, 278, note.

signed and enrolled (*a*); nor will it make a difference that the proceedings are under the 7 Geo. II. cap. 20. s. 2; the time may be enlarged in either case (*b*).

If the mortgagor file his bill to redeem, and a day be appointed for payment, and he make default in consequence of which his bill is dismissed, this will be equivalent to a decree of foreclosure (*c*); and not only the mortgagor and his heirs, but a purchaser of the equity of redemption *pendente lite* will be bound by it (*d*); and equity will not, as in the case of foreclosure, enlarge the time for payment (*e*). But if the bill be dismissed for want of prosecution, and not for want of payment, the mortgagor will not be estopped from filing a second bill to redeem (*f*).

So anxious is equity to afford every reasonable relief to the mortgagor, that even after a decree of foreclosure has been signed and enrolled, and the mortgagee has been in possession for many years, nevertheless the Court will, under special circumstances, open the decree. In one case the foreclosure was

(*a*) Anon. Barnard, 221. 2 Eq. Ca. Ab. 605. Cocker v. Bevis, 1 Ch. Ca. 61. 15 Vin. 475. Ismood v. Claypool, 1 Cha. Rep. 262. Edwards v. Cunliffe, *supra*, page 511.

(*b*) Wakerell v. Delight, 9 Ves. 36. *Vide* 17 Ves. 417.

(*c*) Cholmley v. Lord Oxford, 2 Atk. 267. Bishop of Winchester v. Payne, 11 Ves. Jun. 199.

(*d*) Garth v. Ward, 2 Atk. 175.

(*e*) Novosielski v. Wakefield, 17 Ves. Jun. 417.

(*f*) Hansard v. Hardy, 18 Ves. Jun. 460.

opened after sixteen years (*a*); and in other cases, the Court has granted the relief on fresh evidence adduced on the mortgagor's behalf (*b*).

There are also certain acts of the mortgagee which will of themselves open the decree, as if there has been unfair conduct or collusion on his part in obtaining the decree (*c*); or if, after foreclosure, he proceed against the mortgagor on his bond or other collateral security (*d*), which the mortgagee may lawfully do (*e*). Whether equity will grant an injunction against the proceedings at law if the mortgagee has sold the estate, and deprived himself of the means of letting the mortgagor redeem, does not seem clear (*f*).

Equity, however, will not open a decree of foreclosure by reason of the overvalue of the estate, and a parol agreement to permit a redemption (*g*); and, after twenty years' possession, the Court will not set aside the foreclosure for mere form (*h*); nor will a bill of revivor

(*a*) Burgh v. Langton, 15 Vin. 476. 2 Eq. Ca. Ab. 609. 5 B. P. C. 213.

(*b*) Cocker v. Bevis, *supra*. Ismood v. Claypool, *supra*.

(*c*) Burgh v. Langton, *supra*. Lloyd v. Mansell, 2 P. Wms. 71. Gore v. Stockpole, 1 Dow. 18. Harvey v. Tebbutt, 1 Jacob and Walker, 197.

(*d*) Dashwood v. Blithway, 1 Eq. Ca. Ab. 317. 15 Vin. 476.

(*e*) Tooke v. Hartley, 2 B. C. C. 126. 2 Dick, 785.

(*f*) *Vide* Tooke v. Hartley, *supra*. Perry v. Barker, 8 Ves. Jun. 527. 13 Ves. 198. 2 Fonb. 277.

(*g*) Wishal v. Short, 3 B. P. C. 558. 2 Eq. Ca. Ab. 177. 7 Vin. 398.

(*h*) Jones v. Kenrick, 5 B. P. C. 244. 2 Eq. Ca. Ab. 602. 15 Vin. 470.

and supplement be a waiver of the decree (*a*); nor will the mere fact of the mortgagee devising the estate as money (*b*), or noticing it, for a collateral purpose, as a debt, open the foreclosure (*c*); and if there have been considerable alterations made in the estate, accompanied with length of possession, the decree will not be opened (*d*). No general rule can, however, be laid down for the opening of a foreclosure; each individual case must rest on its own merits.

A decree of foreclosure cannot be obtained until the estate has become forfeited at law by breach of the condition (*e*); consequently on a Welch mortgage there can be no foreclosure (*f*); and although it is a matter of common right, yet equity will refuse it in case of fraud (*g*); nor will the Court permit the mortgagee's title to be investigated under the proceedings in foreclosure; the Court can only bar the equity of redemption; and will leave the mortgagee to

(*a*) Birch's case, Gilbert's Rep. in Eq. 186.

(*b*) Silberschildt v. Schiott, 3 Ves. and Bea. 45. Stuckville v. Dolben, 15 Vin. 476. Sel. Ch. Ca. 10.

(*c*) Tooke v. Bishop of Ely, 5 B. P. C. 181. 15 Vin. 476. 2 Eq. Ca. Ab. 252, note 2.

(*d*) Lant v. Crisp, 5 B. P. C. 200. 2 Eq. Ca. Ab. 599. Took v. Bishop of Ely, *supra*.

(*e*) Bonham v. Newcome, 2 Vent. 365. 1 Vern. 232.

(*f*) Howell v. Price, Prec. Ch. 423. 1 P. Wms. 291, *et vide* 1 Ves. 407; and *supra* page 207; but as to copyholds, *vide infra* page 519.

(*g*) Saunders v. Dehew, 2 Vern. 271. Bacon Ab. Vol. V. p. 101.

pursue his legal means to establish it (*a*). A default in payment of a half-year's interest on the appointed day, will be a sufficient breach of condition to enable the mortgagee to foreclose (*b*).

It is decided, that a mortgagee may, at the same time, proceed in all his remedies at law and in equity; he may, at the same moment, bring his ejectment, file his bill of foreclosure, and proceed on his bond and other collateral securities (*c*), although the Court will, under special circumstances, grant an injunction against the proceedings at law (*d*). The best and safest course for a mortgagee to pursue, if he suspect the estate is not adequate to discharge the debt, and he cannot obtain a sale by decree of equity (*e*), is to proceed on his legal securities first; for it has been seen that if he first obtain a decree of foreclosure, and afterwards proceed at law, he will re-open the foreclosure; and if he obtain a foreclosure and sell, and then proceed at law for the difference, it is doubtful whether equity will not grant an injunction; but if he first proceed at law,

(*a*) Anon. 2 Ch. Ca. 244. 15 Vin. 475. 5 Bac. Ab. 100.

(*b*) Stanhope v. Manners, 2 Eden. 197. Gladwin v. Hitchman, 2 Vern. 185.

(*c*) Burnell v. Martin, Dougl. 417. Schoole v. Sall, 1 Sch. and Lef. 176. Rees v. Parkinson, 2 Anst. 497, *et vide* 2 Ves. 678. 2 Atk. 343, and *supra*, page 352.

(*d*) Booth v. Booth, 2 Atk. 344. Schoole v. Sall, *supra, et vide supra*, 352.

(*e*) As to this, *vide supra*, page 512, *et seq.*

he may afterwards obtain a decree in equity for payment of the remainder; and, on default of payment, foreclose the estate.

If a conditional surrender be made of a copyhold, a mortgagee may, before admittance and after breach of the condition, proceed to foreclose the estate (*a*); and a mortgagor of copyholds, will, on foreclosure, be directed, if necessary, to surrender to the plaintiff, at the expence of the latter (*b*).

It has been already stated that on mortgages of stock, the mortgagee may forthwith proceed to sell without a decree of the Court, accounting nevertheless for the surplus (*c*).

It is requisite to consider what parties are necessary to a bill of foreclosure. In a subsequent chapter, it will be explained that in whatever form the money is made payable, it will belong to the executor, and that the heir at law of a mortgagee in fee is a trustee of the estate for the personal representative. It is, therefore, good cause of demurrer to a bill of foreclosure filed by the heir of the mortgagee, that the executor of the mortgagee is not a party (*d*); and even if the bill be not demurred

(*a*) Sutton v. Stone, 2 Atk. 101, *et vide supra*, 113.

(*b*) Hill v. Price, 1 Dick. 344.

(*c*) *Vide supra*, page 309.

(*d*) Freake v. Hearsay, 1 Ch. Ca. 51. 2 Freem. 180. 5 Bac. Ab. 101

to, but it comes out in the course of the hearing that the executor is not a party, the plaintiff cannot, it seems, be permitted to proceed (*a*). But, nevertheless, if the cause proceed, and a decree is obtained by the heir of the mortgagee, without the executor, it will be binding on the mortgagor; and, it seems, the heir of the mortgagee may either pay the mortgage-debt to the personal representative, or give up the estate (*b*).

Secondly: if *A.* mortgage to *B.*, and *B.* make a derivative mortgage to *C.*, *B.* will be a necessary party to a bill of foreclosure by *C.*, to prevent a double account (*c*).

Thirdly: if there be several mortgagees who are joint tenants of an entire thing, all must be parties to the foreclosure (*d*). But if trustees lend on mortgage the monies of several *cestuique trust*, one of the *cestuique trust* alone may file his bill of foreclosure, the trustees having refused to assist him, and being made defendants in the cause (*e*). In all cases, however, the trustee himself *must* be made a party to a bill of foreclosure by the *cestuique trust*, as having the legal estate (*f*).

(*a*) Meeker v. Tanton, 2 Ch. Ca. 29. 5 Bac. Ab. 101.

(*b*) Clerkson v. Bowyer and another, 2 Vern. 66. Globe and Wife v. Earl of Carlisle, cited in Clerkson v. Bowyer, *supra*, *et vide* 5 Bac. Ab. 102.

(*c*) Hobart v. Abbott, 2 P. Wms. 643. 5 Bac. Ab. 100.

(*d*) Lowe v. Morgan, 1 B. C. C. 368.

(*e*) Montgomerie v. Marquis of Bath, 3 Ves. Jun. 560.

(*f*) Wood v. Williams, 4 Madd. 186.

Fourthly: if the mortgagee devise the lands in mortgage, and the money due thereon to another, the heir of the mortgagee is not a necessary party (*a*); and if the devisee make the heir a party, he will not be allowed the costs out of the estate (*b*); but if the legal estate descend on the heir of the mortgagee, it would seem that he is an indispensable party to the bill by reason of his having the legal estate (*c*).

Fifthly: in case of mortgage of real estate, whether in fee or for a term of years, the mortgagor, or his heir, is an absolutely necessary party in a bill of foreclosure (*d*); but the executor of the mortgagor need not be made a party (*e*). In a recent case (*f*), the mortgage was for a long term of years created by tenant in fee; the executrix was made a party to the bill, which was dismissed as against her, and, *by consent*, without costs. In a bill for sale, however, after the death of the mortgagor, the personal representative should be a party (*g*), because the personal estate must be first applied.

Sixthly: if the first tenant in tail of the equity of

(*a*) Howe v. Vigures, 1 Rep. in Ch. 33. 1 Eq. Ca. Ab. 318.

(*b*) Skipp v. Wyatt, 1 Cox, 353

(*c*) *Vide* Wood v. Williams, *supra*.

(*d*) Howes v. Wodhave, Ridgway's Rep. 199.

(*e*) Duncombe v. Hansley, 3 P. Wms. 333. note. 5 Bac. Ab. 101. Fell v. Brown, 2 B. C. C. 276.

(*f*) Bradshaw v. Outram, 13 Ves. 234.

(*g*) Daniel v. Skipwith, 2 B. C. C. 155.

redemption be a party to the bill, the decree will bind all the remainder men and the reversioner (*a*). And if a decree for account and foreclosure be obtained, and the first tenant in tail release to the mortgagee, the remainder men and reversioner will be also bound (*b*).

Seventhly: if there be an express estate for life, the first tenant in tail or the reversioner must, generally speaking, be also a party (*c*). But in one instance in which the tenant in tail was abroad (*d*), and out of the jurisdiction of the Court, a decree of foreclosure was obtained against the parties before the Court.

Eighthly: with respect to incumbrancers subsequent to the mortgage, but prior to the filing of the bill, the rule appears to be, that the decree of foreclosure will bind all those who are parties to the bill, but not the rest (*e*); and, consequently, a second mortgagee, or other subsequent incumbrancers, who are not parties to the bill, may, on payment of the first mortgage-debt and costs (*f*), redeem the first mortgagee after the decree obtained, although the first had no notice of the other incum-

(*a*) 2 Atk. 101. Yates v. Hambly, 2 Atk. 237. 5 Bac. 102, *et vide* 1 Dow. 31. Roscarrick v. Barton, 1 Ch. Ca. 220.

(*b*) Reynoldson v. Perkins, Amb. 564.

(*c*) 2 Atk. 101. 1 Dow. 31.

(*d*) Fishwick v. Lowe, 1 Cox, 411.

(*e*) Draper v. Jenning, 2 Vern. 518. Sherman v. Cox, 3 Ch. Rep. 84. Nelson's Rep. 71. 5 Bac. Ab. 102.

(*f*) Lomax v. Hide, 2 Vern. 185.

brances at the time of the decree (*a*). But the decree will be binding on all creditors, by mortgage or judgment (*b*), and assignees of the equity of redemption (*c*), subsequent to filing the bill (*d*).

This distinction is grounded on the principle that the incumbrancers and assignees of the equity of redemption, subsequent to the filing of the bill, are affected by notice, having taken their securities and assignments *pendente lite*. And the like will be the case, although the suit afterwards abate, and a bill of revivor be filed to which these incumbrancers, &c., are not made parties (*e*). The same would probably be the consequence if the mortgage or purchase of the equity of redemption were made *during an actual abatement* of the suit (*f*).

We have already seen (*g*), that on a bill of foreclosure against an infant, a reference to the Master may with the mortgagee's consent, be obtained, to inquire whether it will be for the infant's advantage, that a sale should be made. The mortgagee, may, however,

(*a*) Godfrey v. Chadwell, 2 Vern. 601. Morret v. Westerne, 2 Vern. 663. Sherman v. Cox, *supra*.

(*b*) Bishop of Winchester v. Beavor, 3 Ves. 315. Bishop of Winchester v. Paine, 11 Ves. 198.

(*c*) Garth v. Ward, 2 Atk. 175, *et vide* 11 Ves. 199.

(*d*) Bishop of Winchester v. Paine, *supra*; which case overrules Crisp v. Heath, 7 Vin. Ab. 52.

(*e*) Bishop of Winchester v. Paine, *supra*.

(*f*) Style v. Martin, 1 Ch. Ca. 150, *sed vide* 11 Ves. 200, 201.

(*g*) *Supra*, page 512.

object to such a reference, and insist on a foreclosure; and, it is clear, that a decree of foreclosure against an infant, may be obtained (*a*): but it is not the practice of courts of equity to make a decree against infants without giving them a day to shew cause against it after they come of age (*b*). The usual order on a bill of foreclosure against an infant is for a reference to the Master, to take the account in the usual way, and appoint a day for payment, and in default of payment, the defendant is to be foreclosed; and the decree is to be binding on the infant, unless, on being served with a subpœna to shew cause against the same, he shall, within six months after he shall have attained the age of twenty-one years, shew to the Court good cause to the contrary (*c*). If there are several defendants, and default is made in payment, the foreclosure will be made absolute on such of the defendants as are adult, but as to the infants, the clause nisi may be repeated (*d*). The infant, however, need not wait until twenty-one to shew cause against the decree. He may, by his prochein ami, shew cause at any time (*e*).

(*a*) Williamson v. Gordon, 19 Ves. 114. Mallack v. Galton, 3 P. Wms. 352. Lyne v. Willis, *ibid.* note. Bishop of Winchester v. Beavor, 3 Ves. Jun. 317. Booth v. Rich, 1 Vern. 295. Gundry v. Baynard, 2 Vern. 479. Taylor v. Phillips, 2 Ves. 23.

(*b*) Per Lord Chancellor, 2 Vern. 342.

(*c*) 3 Bac. Ab. 615. Bennett v. Edwards, 2 Vern. 392. Leving v. Lady Caverley, Pre. Ch. 229.

(*d*) Williamson v. Gordon, *supra*.

(*e*) Richmond v. Tayleur, 1 P. Wms. 736. Bennett v. Lee, 2 Atk. 531.

If he shews cause, he may put in a new answer (*a*) He cannot, however, go into the account or redeem but must shew error in the decree (*b*); and if he does not shew cause, within the limited time, he will be bound (*c*). The process by subpœna is to be served on the defendant on his coming of age, and is a judicial writ, and must be returned in term time (*d*).

Under special circumstances, the Court will refuse a decree of foreclosure against an infant, as in a case in which a mortgage was assumed to be made under a power, and it was a question whether the power was well exercised (*e*); and in another case (*f*), in which the security was defective, but the heir was bound to make further assurance by his ancestor's covenant. In the latter case, the Court ordered the account to be taken, and a day appointed for payment, and in case of default the mortgagee was to be let into possession, and the infant, on attaining twenty-one, was to convey, unless, within six months, he shewed good cause to the contrary.

If the infant be the plaintiff, and bring his bill

(*a*) Bennett v. Lee, 2 Atk. 532. Fountain v. Caine, 1 P. Wms. 504. Napier v. Effingham, 2 P. Wms. 401.

(*b*) Mallack v. Galton, Lyne v. Willis, Bishop of Winchester v. Beavor, Williamson v. Gordon, *supra*.

(*c*) 3 Bac. Ab. 615.

(*d*) *Ubi supra*.

(*e*) Sayle v. Freeland, 2 Vent. 350.

(*f*) Spencer v. Boyes, 4 Ves. Jun. 370.

by his guardian to redeem, and a day is given for that purpose, and default made in payment, and the bill consequently dismissed, which, as before stated, is tantamount to a foreclosure, it does not seem clear whether the infant will be bound, or will have six months after he comes of age to shew cause (*a*).

It has been already stated, that in case of infancy, a sale should be prayed by the mortgagee (*b*), by which the infant will be bound (*c*); nevertheless, if he be decreed to join in the conveyance, a day must be given him after he comes of age, within which he may show cause to the contrary (*d*); but if the mortgagee be willing to dispense with the infant's concurrence, a sale may be made without him, and consequently a day need not be given him (*e*).

The same reasoning does not hold in the case of coverture as of infancy, for the law considers that a woman, on her marriage, has reposed in her husband sufficient authority to protect her interests, and therefore a decree of foreclosure against a married woman and her husband, of the right of redemption

(*a*) *Vide* Gregory v. Molesworth, 3 Atk. 625. Napier v. Effingham, *supra*.

(*b*) *Supra*, 516.

(*c*) Booth v. Rich, 1 Vern. 295.

(*d*) Cooke v. Parsons, 2 Vern. 429. Pre. in Ch. 184. Fountain v. Caine, *supra*. Adams v. Gould, 2 Dick. 443.

(*e*) Cooke v. Parsons, *supra*.

in the wife, will be binding, and she will not be allowed a day after discoverture (*a*).

Chambers in the inns of court appear to be subject to the local jurisdiction and authority of the benchers, and the courts of law will not interfere in respect of them; but if the benchers decline to exercise their authority, the ordinary courts will take cognizance of the question; and, therefore, if the benchers refuse to make an order for the foreclosure, or sale of chambers in mortgage, a decree may be obtained in a court of equity (*b*).

In another part of this Treatise (*c*), when speaking of mortgages of the equity of redemption, it has been stated that, by legislative enactment (*d*), a fraud by the mortgagor in executing a second mortgage without giving previous notice of the existing mortgage, is punishable by the loss of his right of redemption, provided other lands are not added in the second mortgage to those in the first mortgage; it is not, therefore, in this place requisite to explain the law on this point.

The final order to a decree of foreclosure is absolutely necessary to its perfection, so much so that without its being obtained, a decree of foreclosure is

(*a*) Mallack v. Galton, 3 P. Wms. 352.

(*b*) Rakestraw v. Brewer, Select Cases in Ch. 55. 2 P. Wms. 511.

(*c*) Pages 242, *et seq.*

(*d*) 4 and 5 Wm. 3. c. 16.

not a good plea to a bill to redeem (*a*); but a release by the mortgagor, after the first decree, would be tantamount to a final order (*b*).

In matters of foreclosure, computation of time must be by calendar, and not lunar months (*c*).

(*a*) Senhouse v. Earl, 2 Ves. 450. 5 Bac. 102.
(*b*) Reynoldson v. Perkins, Amb. 564.
(*c*) Anon. Barnard, 324. 2 Eq. Ca. Ab. 605.

CHAPTER V.

To whom the Money and Lands in Mortgage will belong.

So long as the money and lands in mortgage retain their respective characters impressed upon them in equity, that is, so long as the debt remains the principal, and the land the pledge, so long the mortgage will be personal assets; and, accordingly, if the mortgage be in fee, and the mortgagee die, his heir or devisee will be a trustee for the executor (*a*). Doubts were formerly entertained in this respect in cases in which the mortgage was in fee, and there was neither bond or covenant for payment of the money (*b*); or where the condition for redemption was upon payment to the mortgagee, his heirs or executors. But these are so completely removed, as to render it a mere waste of time to enter into a consideration of the cases upon the subject; the law being now clear that whatever may be the form of the mortgage, it will be part of the personal assets of the mortgagee, and, consequently, will, on his death, un-

(*a*) Barnard. 50.

(*b*) Tilly v. Egerton, 1 Rep. in Ch. 181.

less he direct the contrary, belong to his personal representatives (*a*).

It is indeed open to the mortgagee in the case of a mortgage as well as of any other part of his personal estate, as between his real and personal representatives to convert it into land, and make it pass as such accordingly (*b*). But this depends on other principles of equity, and on the manifest declared intent of the testator, it being evident that if a testator expressly devise to another the mortgaged lands *by name* as real estate, he intends the devisee should have the full benefit of all his interest in that property. On this principle if a man purchase an estate, which afterwards proves to be subject to an equity of redemption, and dies, the money will belong to his heir, and not to his executor (*c*). In like manner, if mortgage-money be articled to be laid out in land and settled, the money will be bound by the articles (*d*).

If the mortgagee in his lifetime obtain a release of the equity of redemption, or obtain an absolute decree of foreclosure, and enter into possession, it is

(*a*) See Thornbrough v. Baker, 1 Ch. Ca. 283. Noy v. Ellis, 2 Ch. Ca. 220. Turner's case, 2 Vent. 348. Hardress, 467. Canning v. Hicks, 2 Ch. Ca. 187. Wynn v. Littleton, 2 Ch. Ca. 51, 52. Sir Thomas Littleton's Case, 2 Vent. 351.

(*b*) Noys v. Mordaunt, 2 Vern. 581. Gilb. Rep. in Ch. 2. Pre. in Ch. 265.

(*c*) Cotton v. Iles. 1 Vern. 271. Maxims in Equity, 21, 22.

(*d*) Lawrence v. Beverley, cited 9 P. Wms. 217.

manifest that the debt and land have altered their characters, for the land has ceased to be a pledge, and the debt has become merged in the land, and, consequently, if from any circumstances after the death of the mortgagee, the foreclosure shall be opened or the release set aside, it is submitted that the heir, and not the executor, will be entitled to the money: inasmuch as the mortgagee has done all in his power to make it real estate. This doctrine was applied in favor of a general devisee, in a case in which a decree nisi only had been obtained on a bill for foreclosure; the mortgagee dying before a final decree (*a*); although, with regard to creditors, the mortgage was still held to be personal assets for the payment of debts.

As the personal representatives are entitled to the money, and as the land is, in equity, a pledge for the payment of it, it follows that if the pledge is forfeited, the personal representative must be also entitled to the land composing the pledge; and therefore, if the mortgagee die, and his heir obtain a release of the equity from the mortgagor, or the land becomes irredeemable from length of time, it will nevertheless belong to the personal representative (*b*), and the heir will be a trustee for him; although if the heir foreclose,

(*a*) Garrett v. Evers, Moseley, 364, *sed vide contra*, Thompson v. Grant, 4 Madd, 438.

(*b*) Ellis v. Gnavas, 2 Ch. Ca. 50. Canning v. Hicks. *ibid.* 187. 1 Vern. 412. Tabor v. Grover, 2 Vern. 367. 1 Eq. Ca. Ab. 328. Wood v. Nosworthy, cited 2 Vern. 193. Clerkson v. Bowyer, *ibid*, 66.

it seems questionable whether he may not pay off the mortgage, and retain the estate (*a*). On the same principle, if a feme covert be possessed of a mortgage in fee, and die, and the lands descend on her heir, her husband will be entitled as her administrator (*b*); and, in like manner, a mortgage in fee made to a citizen of London, was held to be part of his personal estate, and divisible according to the custom (*c*); and in all these cases, the heir at law will be a trustee for the persons beneficially entitled, and be decreed to convey.

If two persons advance money jointly on mortgage, and one of them die, the debt will at law belong to the survivor, but in equity there will be a tenancy in common (*d*), and, therefore, on paying off the mortgage, the concurrence of the personal representatives of the deceased mortgagee is necessary, to give a valid discharge to the mortgagor. The consequence is, that when money is lent by trustees, and it is not desirable to put notice of the trust on the mortgage deed, it has become a practice to insert a declaration that if one of the mortgagees shall die before the money is paid off, the receipt of the survivor shall be a sufficient discharge; and that the concurrence of the personal representative of the de-

(*a*) *Vide supra*, page 520.

(*b*) Turner v. Crane, 1 Vern. 170.

(*c*) 1 Ch. Ca. 285. 2 Freem. 144.

(*d*) Petty v. Styward, 1 Ch. Rep. 31. 1 Eq. Ca. 290, *et vide* 2 Ves. 258. 3 Ves. 631.

ceased mortgagee, shall not be requisite. If lands in mortgage are foreclosed by two or more persons, or the equity of redemption is released to them, the parties will in equity hold the lands as tenants in common (*a*).

The rule appears formerly to have been, that if the mortgagee devised the lands to one for life, with remainder to another in fee, and the money was afterwards paid in, the tenant for life was entitled to one-third part of the principal, and the remainderman to the residue (*b*). But, at the present day, it is conceived the whole money must be invested on trusts corresponding with the limitations of the estate.

The receipt of one of several executors is a sufficient discharge of a debt due to the testator, for each executor represents the deceased (*c*); and therefore if the mortgage is paid to one only of several executors, whether before or after probate, he may give a valid release (*d*).

If a mortgage, whether for a term of years or in fee, belong to a married woman, the husband may reduce it into possession during their joint lives; and if it be for a term of years, he may alone surrender the term; but if it be in fee, a conveyance and fine from

(*a*) 2 Ves. 258. 3 Ves. 631.
(*b*) *Vide* Brent v. Best, 1 Vern. 70.
(*c*) 2 Ves. 267.
(*d*) Austen v. Executors of Dodwell, 1 Eq. Ca. Ab. 319.

him and his wife may be necessary. If the mortgage be for a term of years, he may alone assign the term and debt (*a*), either for or without a valuable consideration; and it will be binding on the wife surviving (*b*). If the mortgage be in fee, and he assign it without his wife's concurrence, or if he become bankrupt, then, it is conceived, equity will not compel her to join in a conveyance without a settlement of part being made upon her, supposing her husband had not become a purchaser of her personal estate by marriage settlement (*c*); and if her husband should die before the legal fee be divested out of her, it may be questionable whether she might not be enabled to recover the whole debt against either the particular or general assignee (*d*). If the husband survive, he will become absolutely entitled to the money, and the heir at law of the wife (if the mortgage be in fee) will be a trustee for him; but if the wife survive, and it be not reduced into possession or legally assigned away, it will survive to her.

(*a*) Packer v. Wyndham, Cha. Pre. 412. Bates v. Dandy, 2 Atk. 207.

(*b*) Mitford v. Mitford, 9 Ves. 98.

(*c*) *Vide* Wright v. Morley, 11 Ves. 17. Beresford v. Hobson, 1 Madd. 373.

(*d*) Mitford v. Mitford, *supra*. Packer v. Wyndham, *supra*. Gilb. Lex. Prat. 277, *sed vide contra* Bosvil v. Brander, 1 P. Wms. 459.

BOOK THE SIXTH.

CHAPTER I.

Of the Right of Redeeming.

THE right of redemption being a creature of equity must be subject to the rules of equity. The Court, therefore, as before noticed (*a*), will make terms with the mortgagor, if necessary, before it permits him to redeem; and the decree for redemption will be either absolute or conditional, as suits the circumstances of the case. Of this, an instance occurs (*b*) in which a mortgagee, having purchased the estate for a valuable consideration, a third party made adverse claim to the right of redemption, but was desirous of having the validity of the mortgage tried at law, before he should redeem; the Court held that he ought to declare whether he would redeem or not before he disputed the title, and that if he would redeem he ought to pay the defendant all his principal money, damages, and costs, which he refusing, the Court dismissed the bill: and in another case (*c*), in which an infant heir of a mortgagor, by

(*a*) *Vide supra*, page 391.

(*b*) Smith v. Vallance, 1 Rep. Ch. 170, *et vide* Goodtitle v. Bailey, Cowp. Rep. 601.

(*c*) Ramsden v. Langley, 2 Vern. 536.

his guardian, having fruitlessly endeavoured by proceedings at law, to overthrow the mortgagee's title, brought his bill to redeem, but the Court would not allow redemption, unless the mortgagor would pay a sum of money which the mortgagee, on his oath, declared he had paid above his taxed costs, in defending the title at law, and the Court also allowed him his costs of taking out administration to the mortgagor as principal creditor.

The general rule of equity however is, that the Court will render its assistance to all pernors of the profits, and all persons claiming any share or interest in the equity of redemption, unless, indeed, their title may have been obtained by fraud, as in a case (*a*), in which a man having married an infant heiress, procured her to levy a fine, and the father of the husband was one of the commissioners who took the fine, the use of which was declared, on failure of their issue, to the survivor in fee; the wife died without issue, and an infant; the husband afterwards made a mortgage in fee, and died; on which the equity of redemption descended on his uncle, and from him, on the father of the husband, and from him on the wife of the plaintiff. The defendant was the heir of the wife, who had bought in the mortgage, and obtained possession of the title-deeds, and got into possession, and, being in possession, had levied a fine, and five years had passed. The deed declaring the uses of the first fine was lost.

(*a*) Packington v. Barrow, Pre. in Ch. 216.

The bill was filed by the plaintiff and wife for a discovery of the deed, and a redemption. The defendant pleaded the ill practices used in obtaining the first fine, and also his own fine and the non-claim, and that there was no such deed as the bill sought, or if there was, it was obtained by fraud. The plaintiff proved the execution of the deed. The Court said, that the father, in taking the fine from his daughter-in-law, could not have been aided in equity; and the plaintiffs claimed under him. The bill was dismissed.

It is also a general principle that no person shall be entitled to redeem but he who can shew a title to the estate of the mortgagor (*a*), but if there be fraud or collusion to the detriment of third parties, as if assignees (*b*), or executors (*c*), or trustees (*d*), refuse to enforce their right, creditors or other parties interested may file their bill for relief.

These general observations being premised, it will be necessary more particularly to consider the different parties who are entitled to redeem.

An equity of redemption will, in its descent, de-

(*a*) Lomax v. Bird, 1 Vern. 182. Bickley v. Dorrington, and Monk v. Pomfret, 2 Eq. Ca. Ab. 605. Barnard. 30.

(*b*) Franklyn v. Fern, Barnard. Rep. 30.

(*c*) *Vide supra.*

(*d*) Troughton v. Binkes, 6 Ves. 573.

volve in like manner as the legal estate, that is, to the common law, or customary heir, according to the circumstances of the case (*a*); and to such heir, the right of redemption of course belongs.

The *hæres factus*, or devisee of the equity of redemption, is entitled to redeem, and he need not make the heir at law of the mortgagor a party, unless he claims to have the will established (*b*).

The assignee of the equity of redemption may also redeem, although the equity has been abandoned for a considerable time. Of this an instance frequently referred to, is to be found in a case before Lord Hardwicke (*c*), in which, a person who is there styled a prowling assignee, bought in, for a very inconsiderable sum, the equity of redemption which had been abandoned for fifteen years. The Court decreed a redemption on terms, namely, that on taking the account before the Master, he should be allowed to surcharge and falsify only (*d*), and that the interest should be calculated at *5l.* per cent., although the usual rate was then much higher.

(*a*) *Vide supra*, page 46.

(*b*) Lewis v. Nangle, 2 Ves. 431. Phillips v. Hele, 1 Ch. Rep. 190.

(*c*) Anon. 3 Atk. 314.

(*d*) As to this, *vide infra*, Cap. *of Accounting*.

The assignees of a bankrupt may redeem (*a*).

Judgment-creditors may redeem, although the judgment be with a stay of execution (*b*); but if leaseholds be in mortgage, a judgment-creditor must take out execution before he can redeem (*c*); for, until then, the judgment is no lien on the leaseholds (*d*).

A creditor was permitted to redeem whose debt was considered to be released by operation of law, and to subsist in equity only, as in a case (*e*) of a bond given by husband before marriage to his wife for a sum of money payable after his decease.

Tenant by *elegit* or statute (*f*), and sequestrators (*g*), may redeem.

The crown, or its grantee, may redeem on forfeiture of the equity of redemption (*h*).

(*a*) Franklyn v. Fern, *supra*.

(*b*) Stonehewer v. Thompson, 2 Atk. 440.

(*c*) Shirley v. Watts, 3 Atk. 200. Angel v. Draper, 1 Vern. 399.

(*d*) *Vide supra*, Page 70.

(*e*) Acton v. Pierce, 2 Vern. 480. Cha. Prec. 237.

(*f*) Bunbury, 347. 2 Eq. Ca. Ab. 594.

(*g*) Fawcett v. Fothergill, Dick. 20.

(*h*) Attorney-General v. Crofts, 1 B. P. C. 222. Lovell's case, 1 Salk. 85. 1 Eden. 210.

A tenant, it is said, may redeem, or procure one to redeem for him (*a*).

Although a voluntary conveyance be, under the 27th of Elizabeth, fraudulent and void against a mortgagee, who is, *pro tanto*, a purchaser, nevertheless the party claiming under the deed is entitled to redeem (*b*).

If a mortgage be made in exercise of a power, the persons claiming in default of appointment may redeem (*c*).

A dowress (*d*), tenant by curtesy (*e*), and jointress (*f*), may redeem.

Subsequent mortgagees may redeem (*g*); but if the first incumbrancer be not in possession, they must pay him all the arrears of interest (*h*).

(*a*) Keech v. Hall, Doug. Rep. 22.

(*b*) Rand v. Cartwright, 1 Ch. Ca. 59. Thorne v. Thorne, 1 Vern. 182. Barthrop v. West, 2 Ch. Rep. 62.

(*c*) Innes v. Jackson, 16 Ves. Jun. 367.

(*d*) Palmes v. Danby, Pre. Ch. 137.

(*e*) Bunb. 347.

(*f*) Howard v. Harris, 2 Ch. Ca. 171. 2 Vent. 363.

(*g*) Fell v. Brown, 2 B. C. C. 276.

(*h*) 1 Ves. 268.

Tenant for life, or remainder-man, or reversioner, may redeem (*a*).

If a term of years be purchased, in the joint names of the husband and wife, and the husband mortgage it, and afterwards die in the life-time of his wife, the creditors of the husband may, it seems, redeem (*b*).

It was decided that a protestant heir might redeem a mortgage made by a papist (*c*).

A committee of a lunatic may redeem for the benefit of the heir (*d*).

And lastly: a guardian of an infant may apply the rents in discharge of the principal of the mortgage (*e*), because the mortgage is a subsisting charge and lien on the estate (*f*).

The next point for our consideration is, *the time* within which the equity of redemption will be allowed. It is repeatedly laid down in the books that there is no absolute time which will bar the right of

(*a*) Aynsley v. Reed, Dick. 249.

(*b*) Watts v. Thomas, 2 P. Wms. 365.

(*c*) Jones v. Meredith Bunbury, 346. Comyn's Rep. 661, *et vide* Co. Litt. 391 (a). n. 346.

(*d*) *Ex parte* Grimstone, Amb. 706.

(*e*) Palmes v. Danby, Pre. Ch. 137.

(*f*) *Vide supra.*

redemption; and the point may be conceded, for it being determined that an equity of redemption is not within the statute of limitations, and that the Court will always admit an explanation of the circumstances occasioning the delay, it may be justly said that there is no positive and fixed period beyond which redemption cannot be obtained. Nevertheless, the same reasons which induced the legislature to limit the period for trying at law the right of possession to an estate, operate as forcibly on the consideration of equity for limiting the right of redemption of the equitable estate; and, accordingly, after a considerable conflicting of opinions, it is settled, that the courts of equity will be regulated in this respect by analogy to the statute of limitations (*a*), and that after twenty years' abandonment by the mortgagor (*b*), the right of redemption shall be lost, unless the mortgagor can bring his case within one of the exceptions mentioned in the statute, namely, imprisonment (*c*), infancy (*d*), coverture (*e*), or being beyond the seas (*f*) (not having absconded (*g*)) or nonsane memory, in any one of which cases, the Court will, in further analogy to the statute, give ten years after the disability removed (*h*). But if the time once

(*a*) 21 Jac. 1. cap. 16.

(*b*) Corbett v. Barker, 1 Anstr. 138. 3 Anstr. 755.

(*c*) *Vide* Jenner v. Tracey, 3 P. Wms. 287. n.

(*d*) *Vide supra.*

(*e*) Cornel v. Sykes, 1 Ch. Rep. 198.

(*f*) Jenner v. Tracey, *supra.*

(*g*) *Vide supra.*

(*h*) White v. Ewer, 2 Vent. 340. Belch v. Harvey, 3 P. Wms. 287, n. *Et vide* Beckford and others v. Wade, 17 Ves. 99.

begin to run, a subsequent legal disability, in analogy to the decisions at law, will not be sufficient to stop it (*a*).

The mortgagee may plead the statute of limitations in bar of the right to redeem (*b*), or may demur (*c*). If he demur, the plaintiff may shew special circumstances on the face of the bill, for overruling the demurrer (*d*); and if he plead, the plaintiff may reply to the plea, or amend his bill, or may prove himself to be within the exceptions (*e*).

There are, however, many circumstances beside the legal disabilities before noticed, which will take the case out of the statute; amongst which are the following.

If there be fraud or oppression in the transaction (*f*), or if the mortgagee use unfair means to clog the redemption of the mortgage (*g*), or the like.

(*a*) Floyd v. Mansel, Gilb. Rep. in Eq. 185. Saint-John v. Turner. 2 Vern. 419. Knowles v. Spence Moseley, 225. 1 Eq. Ca. Ab. 315. Anon. 2 Atk. 338. Corbett v. Barker, 1 Anstr. 138. 3 Anstr. 755.

(*b*) Aggas v. Pickerell, 3 Atk. 225.

(*c*) Hodle v. Healey, 1 Ves. and B. 536. Hardy v. Reeves, 4 Ves. 479.

(*d*) *Vide supra.*

(*e*) Aggas v. Pickerell, *supra.*

(*f*) Spurgeon v. Collier, 1 Eden. 55.

(*g*) Ord v. Smith, Select Ca. in Ch. 9.

Any act of the mortgagee acknowledging the mortgage as subsisting within twenty years of the filing of the bill, will take it out of the rule, although the transaction be not with the mortgagor or his heirs (*a*), or it be a mere private account kept by the mortgagee of the profits of the estate in which he treats it as redeemable (*b*). The accounts kept by a receiver of the estate are not however sufficient (*c*). An account kept with the mortgagor, or his heirs, within twenty years, will save the equity of redemption, whatever may have been the length of possession by the mortgagee (*d*). But a mere demand by the mortgagor without process or acknowledgement by the mortgagee will not be sufficient (*e*). A conveyance by the mortgagee or his heirs of the lands, subject to the equity of redemption, is a clear acknowledgment (*f*), although it is said that the words "subject to the subsisting equity of redemption, *if any*," is not (*g*). A surrender of copyholds by a mortgagee to the use of his will, is said to be demonstrative of intention neither way (*h*);" but this observation does

(*a*) Hansard v. Hardy, 18 Ves. 455.

(*b*) Fairfax v. Montague, cited 2 Ves. Jun. 84. Campbell v. Beckford, cited 4 Ves. 474. Lake v. Thomas, 3 Ves. 17—22.

(*c*) Barron v. Martin, Coop. C. C. 189, &c.

(*d*) Procter v. Cowper, 2 Vern. 377. Anon. 2 Atk. 383.

(*e*) 1 Ves. and Bea. 540.

(*f*) Smart v. Hunt, 4 Ves. 478. n.

(*g*) Hardy v. Reeves, *ibid.* 480.

(*h*) *Vide supra, et vide* Martin v. Mowlin, 2 Burr. 970.

not of course apply, if there be any reference to the subsisting equity. If the mortgagee devise the lands as his mortgaged estate (*a*) or allude to the mortgage as by a disposition of the money *if the mortgage should be redeemed*, there will be a sufficient acknowledgment (*b*). On the like principle, a redemption was allowed after forty years' possession, on evidence of a contract entered into within seven years preceding the filing of the bill by the heir of the mortgagee, for purchase of the equity of redemption (*c*). Parol evidence is admissible to affect the mortgagee, but it must be clear and unimpeachable (*d*).

The case will be also taken out of the statute if the mortgagee submit to be redeemed (*e*).

Or if the mortgagor, or his heir, remain in possession of any part of the estate (*f*).

Or if the time be otherwise well accounted for, as in a case in which it appeared that there had been a promise that the mortgagor should be at liberty to

(*a*) 3 Atk. 314.

(*b*) Ord v. Smith, Sel. Ca. Ch. 9. 2 Eq. Ca. Ab. 600.

(*c*) Conway v. Shrimpton, 5 B. P. C. 187.

(*d*) Whiting v. White, 2 Cox, 295. Perry v. Marston, 2 B. C. C. 397, more fully reported in Whiting v. White.

(*e*) Proctor v. Oates, 2 Atk. 140.

(*f*) Rakestraw v. Brewer, Sel. Ch. Ca. 55. 2 P. Wms. 511. Moseley, 189.

redeem after twenty-seven years; a redemption was allowed after forty-one years, being only fourteen years from the time allowed (*a*): and, as in another case (*b*), in which redemption was allowed fifty years after the mortgage, and after forty-seven years' possession by the mortgagee, and five ejectments at law to try the title, and refusal by four several answers to account, the time being accounted for by the legal proceedings. If, however, a mortgagor file his bill to redeem, and obtain a decree to account, he must prosecute his suit, or in twenty years he will be barred (*c*).

No time will bar the redemption of a Welsh mortgage (*d*), or if the mortgage-deed contain an agreement that the mortgagee shall hold until the mortgage be satisfied (*e*), unless on an account taken of the rents and profits it appears that the mortgagee has been in possession upwards of twenty years since the mortgage-debt was fully paid (*f*).

Even if the equity of redemption be actually released by the mortgagor to the mortgagee, evidence will be admitted that the release was made upon a

(*a*) White v. Pigeon, Tothill, 135.

(*b*) Palmer v. Jackson, 1 B. P. C. 281.

(*c*) Saint-John v. Turner, 2 Vern. 418.

(*d*) Howell v. Price, Gilb. Eq. Rep. 106, Pre. Ch. 423. 1 P. Wms. 291.

(*e*) Ord v. Heming, 1 Vern. 418. Yates v. Hambly, 2 Atk. 359.

(*f*) Yates v. Hambly, *supra, et vide* 1 Mer. 125, and *supra*, Cap. *Welch Mortgages*.

secret trust for his benefit (*a*), or that it was not intended to be an absolute sale (*b*).

A very important class of cases is next to be considered, viz. those in which the question has been whether it is intended by the parties making the mortgage, that the equity of redemption shall be limited in a manner different from the uses subsisting in the estate prior to the mortgage or shall result to the same uses.

These questions have generally arisen in mortgages by husband and wife; and the principle of equity in such cases is, that if money be borrowed by the husband and wife upon the security of the wife's estate, although the equity of redemption is by the mortgage-deed reserved to the husband and his heirs, or to the husband and wife and their heirs, yet there shall be *a resulting trust* for the benefit of the wife and her heirs; and that the wife or her heir shall redeem, and not the heir of the husband (*c*). The same principle applies, if the wife concur in a mortgage of her jointure lands (*d*), or of lands on which she has

(*a*) Morly v. Elwys, 1 Ch. Ca. 107.

(*b*) Vernon v. Bethell, 2 Eden. 110.

(*c*) *Vide* Huntingdon v. Huntingdon, 2 Vern. 437. Corbett v. Barker, 1 Anst. 138. 3 Anst. 755. Ruscombe v. Hare, 6 Dow. 1.

(*d*) Cotton v. Cotton, 2 Ch. Rep. 72. Brend v. Brend, 1 Vern. 213. Skin. 338. 1 Eq. Ca. Ab. 62. 1 Bligh, 115, 117. Southcoat v. Manory, Cro. Eliz. 744.

right of dower (*a*); in which last mentioned cases, the general rule is, that her concurrence in a fine to let in the mortgage, shall not prejudice her rights, although the equity of redemption be limited to the husband and his heirs; but she shall, on his death, be admitted to redeem.

Lord Redesdale, in a recent case before the House of Lords (*b*), observed, that it must be now admitted, as a general principle to be applied in deciding upon the effect of mortgages of this description, whether it be the estate of the wife, or the estate of the husband, if the wife join in the conveyance, either because the estate belongs to her, or because she has a charge by way of jointure, or dower, out of the estate, and there is a mere *reservation* in the proviso for redemption, which would carry the estate from the person who was owner at the time of executing the mortgage; or where the words admit of any ambiguity, there is a *resulting trust* for the benefit of the wife, or for the benefit of the husband, according to the circumstances of the case. Lord Eldon appears to have been inclined (for the wife's protection) to have carried the principle even to the extent of the opinion which his lordship conceived was entertained by Lord Thurlow (*c*), viz. that in order to dispose of the equity of redemption of the wife in an estate, it

(*a*) Jackson v. Parker, Amb. 687.

(*b*) See 1 Bligh, 126.

(*c*) *Ibid.* 135, *et vide* Ruscombe v. Hare, *supra.*

was absolutely necessary there should be in the *recitals* of the instrument some expression that the parties meant it so; that it was not enough to collect the intention from the limitations, but there must be something more upon the face of the deed to lead the wife to understand what those limitations were, but his Lordship allowed that it seemed to him, on looking into the cases, that such a proposition could not be supported." It is perhaps to be regretted that the opinion of Lord Thurlow could not be sustained to its full extent. The case of Rowel v. Walley (*a*), is, indeed, a direct authority that the limitations alone will be sufficient for the purpose of altering the wife's equity. In that case, the mortgage was of the lands of the wife: the proviso for redemption was, that if the husband and wife, or either of them, or their heirs, &c., should pay to the mortgagee, &c., then the fine thereby agreed to be levied should enure to the use of the husband and wife, and the longest liver of them, with remainder to the right heirs of the husband for ever. The husband died, leaving a son and heir. The widow intermarried with the plaintiff, and on bill filed by Rowel and wife against the heir of the mortgagee, and also against the heir of her former husband for redemption, the Court directed that the plaintiff, as tenant for life, should pay one-third, and that the heir at law of her former husband should pay two-thirds of the mortgage-money as being entitled to the reversion in fee (*b*).

(*a*) 1 Ch. Rep. 116.

(*b*) As to the proportions between Tenant for Life and Remainder-man, *vide infra*, page 552.

The case of Innes v. Jackson (*a*) was decided in Chancery in accordance with Lord Thurlow's notion, viz. that there should be sufficient evidence in the recitals to inform the wife of the alteration in the limitations. In that case, lands were limited to the use of the husband and wife for their lives, with remainder to their children in strict settlement, with remainder to the wife in fee, with power to the husband and wife to revoke, and to limit new uses. All the issue of the marriage died infants in the lifetime of their parents. In 1745, the husband and wife demised the lands to Child, for 1000 years, subject to redemption, on payment by husband and wife, or either of them, or their or either of their heirs, &c. of 200*l.* They afterwards borrowed 200*l.* more, and charged it on the term for years, with a similar proviso for redemption. They also covenanted to levy a fine which should enure to the use of the mortgagee for the term, subject to the proviso, and after the expiration, or sooner determination thereof, to the use of the husband and wife for their lives, with remainder to the heirs of their bodies, with remainder to the right heirs of the survivor. The husband survived; the defendant was his devisee; the plaintiff claimed as the heir at law of the devisee of the heir at law of the wife. The Court decided in favor of the title of the wife. Against this judgment, the heir at law of the husband appealed to the House of Lords, and the decree was reversed (*b*).

If a mortgage be made under a power of appoint-

(*a*) 16 Ves. 356.
(*b*) 1 Bligh.

ment it is a revocation of the subsisting uses *pro tanto* (*a*); and therefore whether the form of the proviso for redemption be, that on payment of the mortgage-money the appointment shall be void, or the estate shall be re-conveyed to the old uses, or shall be conveyed to the use of the mortgagor, his heirs and assigns; the equity of redemption will, in all respects, correspond with the title prior to the mortgage, unless on the face of the instrument an ulterior intention be indicated inconsistent with a future exercise of the power (*b*).

It is, in the next place, requisite to consider in what *method* redemption is to be effected where there are several parties entitled.

Redemption will be decreed according to the priorities of the claimants; that is, if there are several mortgagees, the Court will decree in detail, that the second shall redeem the first, the third the second, and so on (*c*).

If the equity of redemption be limited to uses, the remainder-man may file his bill to redeem (*d*), but he must give the first tenant for life and intermediate remainder-men an option of redeeming according to

(*a*) *Vide supra*, page 59.

(*b*) *Vide* 16 Ves. 367, Powell on Mortgages, 346. Patch on Mortgages, 176, and *supra*, page 59.

(*c*) Arcedechne v. Bowes, 3 Mer. 216. n.

(*d*) *Vide* Corbett v. Barker, 1 Anstr. 138. 3 Anstr. 755.

their priorities. And if creditors come in to redeem, they must make the persons legally entitled to the equity of redemption, such as executors or assignees of a bankrupt, parties to their bill (*a*).

It was formerly the rule, that a remainder-man or reversioner could compel the tenant for life to contribute to the redemption (*b*), and that the tenant for life should pay one-third, and the remainder-man two-thirds (*c*); and in one case, it was decreed, that the tenant for life should contribute two-fifths, and the remainder-man three-fifths (*d*). This, however, is now entirely altered, the rule now being that the tenant for life shall be compelled only to keep down the interest during his life (*e*): but if the tenant for life refuse to redeem, the remainder-man may, by redeeming the mortgage, and ejecting the tenant for life, and taking possession of the profits, or by filing a bill of foreclosure, compel the tenant for life to come in and contribute, or give up the possession of the estate (*f*).

Subsequent mortgagees cannot redeem without making the mortgagor, or his heir, a party to the

(*a*) Barnard. Rep. 33.

(*b*) Hayes v. Hayes, 1 Cha. Ca. 224. Cornish v. Mew, *ibid.* 271. Clyat v. Batteson, 1 Vern. 404. Ballett v. Sprainger, Pre. Ch. 62. Rowel v. Walley, *supra, et vide*, 3 Anstr. 757.

(*c*) *Vide supra.*

(*d*) James v. Hales, 2 Vern. 268. Pre. Ch. 44.

(*e*) White v. White, 9 Ves. 560, *et vide supra*, page 445.

(*f*) *Vide* 3 Anstr. 757.

bill (*a*); and if the heir be not within the jurisdiction of the Court, the cause cannot proceed, because the decree is, that the second mortgagee shall redeem the first, and the mortgagor, or his heir, shall redeem the second or be foreclosed (*b*). This principle is carried so far, that if a man mortgage an entire estate to *A.* which, on the death of the mortgagor, devolves on two different persons, and one of those persons mortgages his part to another, and the mortgagee of that part file his bill to redeem, he must make not only the first mortgagee, and his own immediate mortgagor, but also the owner of the other share, parties to the bill, because he must redeem the first mortgagee *in toto* (*c*), and the other party, so far as respects part of the estate, is standing in the place of the original mortgagor (*d*).

It has become a settled rule in equity that a mortgagor must, after default made by him in payment of the money according to the proviso in the mortgage-deed, give the mortgagee six calendar months' notice of his intention to pay off the mortgage (*e*), unless the mortgagee has demanded or taken any steps to compel payment; in which latter case, not any notice is requisite; and it has been considered that if

(*a*) Fell v. Brown, 2 B. C. C. 276.

(*b*) *Vide supra, et vide* Palk v. Clinton, 12 Ves. 48. Woodcock v. Mayne, cited *ibid.* 59.

(*c*) 12 Ves. 61.

(*d*) Palk v. Clinton, *supra.*

(*e*) *Vide supra,* page 450, and Vol. 2. Ca. and Opin. page 51.

the mortgagor be willing to pay six months' interest in advance, notice will be unnecessary (*a*); but as interest is by law a remuneration for delay of payment of the principal, it may be a question, whether it would be prudent to accept such interest from the mortgagor, or whether it might not expose the mortgagee to the penalties of the laws against usury.

(*a*) Vol. 2. Ca. and Opin. 51.

CHAPTER II.

Of Accounting.

WHETHER the bill be filed by the mortgagor for redemption, or by the mortgagee for foreclosure, the order of the Court is, that it be referred to the Master to take an account of principal, interest, and costs, due to the mortgagee. But if the reference be made on application of the mortgagor (*a*), under the remedial Act of the 7th of Geo. 2., cap. 20., he will be considered bound by the sum charged in the bill by the mortgagee, and it will not be open to the Master to admit evidence to the contrary (*b*).

The usual decree of the Court is, that the Master shall take an account of what the mortgagee has received, or might have received, if it had not been for his own default; but any sums received subsequent to the decree, must be brought into the account (*c*), although the decree does not, in words, extend to future rents.

It is the privilege of the mortgagor, as before stated (*d*), not to be bound to account for the rents and profits while in possession; and, it seems, there

(*a*) *Vide supra*, page 335.
(*b*) Huson v. Hewson, 4 Ves. 103, *et vide supra*, page 339.
(*c*) Bulstrode v. Bradley, 3 Atk. 582.
(*d*) *Vide supra*, page 332.

is no instance to the contrary, however insufficient the security may prove (*a*).

The mortgagee is subject to an account from the time he takes possession; but the Master must not take annual rests of rents received, unless specifically directed by the decree (*b*). The Court will, however, it seems, direct annual rests, if there be no interest in arrear when the mortgagee takes possession (*c*), and in certain cases, in which the rents considerably exceed the interest (*d*), but in general, the Court does not direct annual rests (*e*), and never for *part* of the time (*f*). If the mortgagee was paid in full at the time of filing the bill, he will be charged with interest on the balance in his hands (*g*).

The mortgagee, as before mentioned (*h*), has on redemption a right to principal, interest, and costs, but there must be a special order for an allowance for improvements (*i*). A mortgagee cannot charge for his personal trouble (*k*), although there be a private

(*a*) Colman v. Duke of St. Albans, 3 Ves. 25. *Ex parte* Wilson, 2 Ves. and Bea. 252, *et supra*, pages 332, 338.

(*b*) Webber v. Hunt, 1 Madd. 13. Davis v. May. Fowler v. Wightwick, *cited ibid.*

(*c*) Shephard v. Elliott, 4 Madd. 254.

(*d*) Gould v. Tancred, 2 Atk. 533.

(*e*) Davis v. May, Cooper's Rep. 240, and the several cases there mentioned.

(*f*) *Ubi supra.*

(*g*) Quarrell v. Beckford, 1 Madd. 269.

(*h*) *Supra*, pages 353.

(*i*) Knowles v. Spence, Moseley, 226.

(*k*) *Supra*, page 353.

agreement for that purpose (*a*); but there may be an agreement between them for the appointment of a receiver, which will be allowed; and if the estates lie dispersed, and at a distance from the mortgagee's residence, so that if the estate were his own, he would employ a receiver to collect the rents, he may, it seems, appoint a receiver without such agreement (*b*).

A mortgagee shall not account for any imaginary profits which he might have made of the land, but only for the actual rent; unless there be fraud or wilful default in his conduct, as if he turned out a sufficient tenant, or refused higher rent than what he actually received, or the like (*c*); but in taking the account, if the mortgagor prove the estate to have been let at a certain rent at any time during the mortgagee's possession, the onus will be thrown on the mortgagee, to show that such was not the rent during the whole period of his possession (*d*).

If a mortgagee act *malâ fide*, either with regard to subsequent incumbrancers or creditors of the mortgagor, or with regard to the mortgagor himself, he will be personally responsible; as, for example, if he permit the mortgagor to make use of his mortgage as the first incumbrance, to keep out other creditors;

(*a*) French v. Baron, 2 Atk. 120, *et vide supra*, page 353.

(*b*) *Vide supra*, page 353.

(*c*) *Vide supra*, page 355. Hughes v. Williams, 12 Ves. 493.

(*d*) Blacklock v. Barnes, Sel. C. C. 53.

as where the mortgagor having become bankrupt, and the mortgagee refusing to enter, the assignees brought ejectment, the mortgagee permitted the bankrupt to take the profits, and to fence against the assignees with the mortgage, and it was decreed that the mortgagee should be charged with profits from the time of the ejectment delivered (*a*). So, if the mortgagee enter, and afterwards permit the mortgagor to receive the rents, on a bill by a subsequent creditor to redeem, he will be charged with all the profits he might have made after his entry (*b*). But the mortgagee will not, in such case, be answerable for profits which he might have made previously to the date of the next incumbrance (*c*); nor, indeed, it should seem, for the profits which he might have received prior *to notice* of such subsequent incumbrance (*d*). If the first mortgagee, with notice of a subsequent incumbrance, concur with the mortgagor in a sale, and permit the mortgagor to receive the money, it shall sink so much of the mortgage-debt as against the second mortgagee (*e*). In another case, in which the mortgagee having brought ejectment and then refused to take out execution, and the rent being in arrear, the mortgagor could not eject the tenant by reason of the mortgagee's judgment, the Court ordered that, unless the mortgagee took out execu-

(*a*) Chapman v. Tanner, 1 Vern. 267.

(*b*) Cropping v. Cooke, 1 Vern. 270. Bentham v. Haincourt, Pre. Ch. 30.

(*c*) Maddocks v. Wren, 2 Rep. Ch. 109.

(*d*) *Sed quære.*

(*e*) Bentham v. Haincourt, *supra*.

tion before the end of the term, he should be answerable for the profits, as in case of wilful default (*a*).

The account taken before the Master, between the mortgagor and first mortgagee, will be binding on subsequent incumbrancers, although they were not parties to the suit (*b*). In like manner, an account stated between the mortgagee and tenant for life, will be binding on a contingent remainder-man coming afterwards into *esse* (*c*); and an account stated between the mortgagee and assignees of a bankrupt, will be binding on all parties claiming under the bankrupt (*d*); and an account taken during minority, will be binding on the infant (*e*). In every case, the account is liable to be opened for fraud, or the party will be allowed, in case of specific error alledged and proved, to surcharge and falsify; he cannot, however, go into the general account (*f*). but if he be at liberty to surcharge and falsify, he is not merely confined to errors in fact, but may, it is said, take advantage of errors in law (*g*).

(*a*) Duke of Buckingham v. Sir R. Gayer, 1 Vern. 258.

(*b*) Needler v. Deeble. 1 Cha. Ca. 299. Williams v. Day, 2 Cha. Ca. 32. Sherman v. Cox, 3 Cha. Rep. 85. Crisp v. Heath, 7 Vin. Ab. 52.

(*c*) Allen v. Papworth, 1 Ves. 164.

(*d*) Knight v. Bamfield, 1 Vern. 179.

(*e*) Badham v. Odell, 4 B. P. C. 347.

(*f*) Needler v. Deeble. Williams v. Day. Sherman v. Cox. Crisp v. Heath. Allen v. Papworth. Knight v. Bamfield. Badham v. Odell, *supra, et vide* Taylor v. Haylin, 2 B. C. C. 310. Johnson v. Curtis, 3 B. C. C. 266. Drew v. Power, 1 Scho. and Lef. 192. Chambers v. Goldwin, 9 Ves. 266, and Vernon v. Vawdry, 2 Atk. 119.

(*g*) Roberts v. Kuffin, 2 Atk. 112.

There appears no legal objection to an attorney taking a mortgage-security for his bill of costs, pending the litigation; but if the security be taken for an unsettled account, a bill for a general account will at any time lie against him (*a*); and although it is a rule that a settled account shall not be opened unless particular errors are pointed out, yet, if on a bill filed by a client against his attorney, alledging error generally in an account settled between them, the attorney admit the fact, the account will be opened (*b*). And if a solicitor having taken a mortgage-security charges poundage in his account on the amount of rents received, without informing his client that he has legally no right so to do, the mortgagor will be allowed to surcharge and falsify, notwithstanding his acquiescence in the charge (*c*).

If an account be taken before the Master, and no further proceedings are had, and afterwards a second account is directed, it will be taken from the foot of the first account (*d*).

A mortgagor is not bound by an account (to which he is not a party) stated between the mortgagee and his assignee (*e*). The consequence is, that an assignee is, in such case, liable to account for all

(*a*) Detillin v. Gale, 7 Ves. 583.
(*b*) Matthews v. Wallwyn, 4 Ves. 118.
(*c*) Langstaffe v. Fenwick, 10 Ves. 405.
(*d*) Procter v. Cowper, 2 Vern. 377.
(*e*) *Supra*, pages 318, 319.

the profits received by the mortgagee, and the *intermediate assignees*, and the mortgagor need make the last assignee only a party to his bill (*a*). Mr. Powell, in his work on Mortgages (*b*), has cited two cases (*c*), in support of a different opinion, but the law must be considered as stated by Lord Eldon in Chambers v. Goldwin.

If a mortgagee in possession assign his mortgage without the concurrence of the mortgagor to an insolvent person, he will be liable for the rents as well before as after assignment, because he is in some sort a trustee of the estate (*d*).

A mortgagee will not be allowed his expences in opening mines or quarries, but must speculate at his own hazard (*e*); but he will be allowed all his fair expences in renewing leases, necessary repairs, lasting improvements, and costs (*f*).

(*a*) Chambers v. Goldwin, 9 Ves. 268, 269.

(*b*) Page 1086.

(*c*) Pearson v. Pulley, 1 Ch. Ca. 102. Cloberry v. Lymonds, 2 Ch. Rep. 392.

(*d*) *Vide supra*, page 368.

(*e*) Hughes v. Williams, 12 Ves. 492.

(*f*) *Vide supra*, page 392, and Thorne v. Newman, Finch. 38. Lomax v. Hide, 2 Vern. 185. Quarrell v. Beckford, 1 Madd. 281. Trimleston v. Hamill, 1 Ball and Beatty, 385.

CHAPTER III.

Of Purchasing Incumbrances.

If a stranger become the purchaser of an incumbrance for less than its actual value, he will, as against the mortgagor or his heirs (*a*), be entitled to require payment of the full debt.

It has been questioned whether as against a *bonâ fide* purchaser of the estate, without notice of the incumbrance (*b*), or as against subsequent creditors (*c*), the purchaser could require payment of more than he actually paid; and it is laid down in Gilb. Lex Præt. (*d*), that if a stranger purchase an incumbrance at an under value, with notice of a subsequent incumbrance, the latter creditor might redeem him, paying the money that the former gave, because the latter was entitled to redemption before the other interfered; but if the first incumbrancer had offered it to the second mortgagee at the same price at which the stranger purchased it, and he had refused the offer, the case had been different, and a quære is added,

(*a*) Phillips v. Vaughan, 1 Vern. 336. Williams v. Springfield, *ibid*, 476. Baker v. Kellett, 3 Cha. Rep. 23. Anon. 1 Salk. 155.

(*b*) Phillips v. Vaughan, *supra*.

(*c*) Williams v. Springfield, *supra*.

(*d*) 282, 283.

whether, if the second incumbrancer had notice of the whole money lent by the first mortgagee at the time he advanced his money, the purchaser might not have required the full debt.

In another case (*a*), it is stated to have been determined by the Court that an heir, or *any other*, should not, as against a real purchaser, be allowed more on any incumbrance bought in than what he actually paid for the same, without regard to what was really due on such incumbrance.

It is, however, now clear that a *creditor* purchasing in a subsequent incumbrance for less than its value, shall be entitled as against intermediate incumbrancers, or others, to recover the full amount of the debt (*b*); but it is doubted whether the same doctrine applies to a *stranger* (*c*). In the anonymous case in Salkeld, however, it is stated, that "if one acts for himself, and being not in the circumstances of a trustee or executor, buy in a mortgage for less than is due, or for less than it is worth, he shall be allowed all that is due on the mortgage, for he stands in the place of him that assigned, viz. the mortgagee, who might have given it to him *gratis*, and what is due must be the measure of our allowance, and not what he gave, for that might have been more than it is worth, as well as less, and since he runs the hazard, if loss happens,

(*a*) Long v. Clopton, 1 Vern. 464.

(*b*) Morret v. Paske, 2 Atk. 54. Darcy v. Hall, 1 Vern. 49, *et vide* Bromley v. Holland, 5 Ves. 620. n.

(*c*) *Vide* Powell, 396, Patch on Mortgages, 278, 279, *et quære*.

he ought to have the benefit in case it turns to advantage; so said and admitted, per Cowper, Lord Chancellor." These remarks apply as much to a stranger as to a creditor.

In Morret v. Paske (*a*), Lord Hardwicke says, "an agent, trustee, heir at law, or executor, purchasing a puisne incumbrance, shall as against another incumbrancer, be paid no more than what he gave for this incumbrance, otherwise as to a prior creditor, who *bonâ fide* buys in the puisne incumbrance, though he did not give the full value for it." "The rule," he adds, "is laid down generally indeed by Lord Chancellor Jefferys, in the case of Williams v. Springfield (*b*), as well with regard to creditor and creditor, as to trustees, heir at law, or executor, but I cannot say that I remember any decree in this Court, subsequent to that case, where it has been laid down as a general rule, but has been much more narrowed since, and holds only, as I observed before, with regard to agent, trustees, heir at law, or executor (*c*)." Now although Lord Hardwicke's remark applies especially to the case of a creditor purchasing in an incumbrance, yet it will be observed, that the doctrine of Chancellor Jefferys applied as well to the case of the stranger, as of the creditor, and Lord Hardwicke's disapprobation of his law is expressed in general terms; and it is suggested that the point

(*a*) 2 Atk. 53. *Et vide* Bromley v. Holland, 5 Ves. 620. note.

(*b*) *Vide supra.*

(*c*) *Et vide* Brathwaite v. Brathwaite, 1 Vern. 335, and Anon. 2 Vent. 353.

is open to discussion, whether the doctrine of Chancellor Jefferys must not be confined to the instances put by Lord Hardwicke, viz. of agents, trustees, heirs at law, and executors, excepting that it will, it seems, apply to the case of a *guardian* buying in an incumbrance charged on the estate of the infant for less than its value, of which the infant will have the advantage (*a*).

A distinction must be taken if the heir at law or trustee, &c., has himself a charge on the estate; in which case he will have the full benefit of an incumbrance bought in for his protection (*b*).

(*a*) Powell v. Glover, 3 P. Wms. 251. note.
(*b*) Darcy v. Hall, 1 Vern. 49.

CHAPTER IV.

Of Devises and Bequests of Mortgages.

Every mortgagee, so long as the land is redeemable, has a two-fold interest in the property in mortgage, *viz.* a beneficial interest, which in the eye of equity is personal estate, and a legal interest, which is either real or personal according to the nature of the mortgage; and in considering the will of a mortgagee, the questions which may arise are, whether he has intended to pass both, or one, or neither of these interests to the parties claiming under the will. If he has not intended to pass either of these interests, then the beneficial interest has devolved on his executor, as part of his personal estate, and (if the mortgage be in fee) the legal interest has devolved on his heir at law, in trust for the executor (*a*); but if the mortgage be for a term of years, then both the legal and beneficial interests have devolved on the executor. If he has passed the beneficial interest only, and the mortgage be in fee, then the legal interest has devolved on the heir at law, in trust for the legatee (*b*). If he has passed the legal interest only, then the devisee has become a trustee for the executor. If he has contrived to pass the beneficial interest to *A.* and the legal interest to *B.*, then *B.* has become a trustee for

(*a*) For an instance of this *vide ex parte* Morgan, 10 Ves. 101.

(*b*) *Vide* Attorney-General v. Meyrick, 2 Ves. 46.

A. (*a*), and lastly, he may have given both the beneficial and legal interests to the same person.

The decisions on some of these points have been various and very contradictory. The effect of the word "*mortgages*" in the will of a mortgagee in fee, has been *vexata quæstio*. It is clear that it will pass the whole interest of the devisor in equity; but a doubt has existed whether it will at law pass the fee-simple of the *lands*. An early case (decided in the Common Pleas) (*b*), is directly in point, that under the words "all my mortgages," the *lands* will pass. In a note of C. B. Parker annexed to the case, it is said that the mortgage was not *forfeited* at the time of making the will; by which is to be understood, it is presumed, that it was more especially considered as coming within the meaning of the word "mortgage." In a subsequent case (decided in the King's Bench, within ten years after the first decision) (*c*), in which the mortgage *was* forfeited, the Court came to a decision contrary to that of Crips v. Grysil, and determined that the lands did not pass under the word "mortgages." But the Court agreed (*d*) that if the testator had devised "all his estate in such land,"

(*a*) *Vide* 1 Atk. 605. n.

(*b*) Crips v. Grysil, Cro. Car. 37. In this case, the words in the will were "all my goods, monies, bills or bonds, mortgages, or specialties for monies."

(*c*) Wilkinson v. Merryland, Cro. Car. 447, 449. The words were "all the rest of my goods, chattels, leases, estates, mortgages, debts, ready money, plate, and other goods whereof I am possessed, I devise to my wife, after my debts and legacies paid.

(*d*) Cro. Car. 450.

or had mentioned that he had such land mortgaged in fee, and had devised "his mortgage" the fee would have passed. It therefore appears that the Court of King's Bench considered the word "mortgage" in a will, strong enough to pass the fee-simple, if the testator's intention to that effect could be ascertained. In the case of the Attorney General v. Meyrick (*a*) the Master of the Rolls appears to have taken for granted, that the word "mortgages" would *not* pass the legal interest in the lands. He says "By a gift of all one's mortgages to *A*, the whole *beneficial* right passes to him, and be the legal interest either in the heir or executor, each will be considered a trustee for him (*b*)." And in the case of the Attorney-General v. Munday (*c*), it was not contended that by a bequest of the *mortgage debt*, the lands in mortgage passed. And yet in a very recent case (*d*) Sir William Grant is reported to have said, there was no doubt *a gift of the money* would carry the mortgagee's interest in the land on which it was secured. The case indeed turned upon a different point, and consequently does not amount to an authority, but still the opinion of so great a lawyer is deserving the highest consideration; the facts were, that a mortgagee in fee of estates in Lancashire, had obtained a decree of foreclosure, and afterwards made his will, by which he gave "the interest or proceeds of certain farms

(*a*) 2 Ves. 47.

(*b*) But it is submitted that the word "*mortgage*" will pass a mortgage term, or other chattel interest.

(*c*) 3 Ves. Jun. 348.

(*d*) Silberschildt v. Schiott, 3 Ves. and Bea. 49.

in the county of Lancaster mortgaged to him for 2500*l.*," to his wife for life, and after her decease he gave "one-third part of the sum of 2500*l.* principal money disposed of in mortgage of farms aforesaid," to his daughter Harriot, and one-third to his daughter Elizabeth, and one-third to his son William. The bill was filed insisting that by the terms of the will, the estates in Lancashire were to be considered as part of the testator's personal estate: the Court held that if the will was duly executed, the land passed by it; and the Master of the Rolls put the case hypothetically, "if it had been a mortgage, there was no doubt a gift of the money would have passed the land." On consideration of these cases, we arrive at the conclusion, that until the point has received the express adjudication of a court of law, the concurrence of the testator's heir cannot safely be dispensed with.

It is clear at the present day, that if a mortgagee in fee in possession of a forfeited mortgage, but the equity of redemption in which is not barred, make a general devise of "all his lands, tenements, and hereditaments, or of all his real estate, the devisee will not take a *beneficial* interest in the lands in mortgage, although under the modern cases he might take the *legal* estate. The case of Strode v. Russel (*a*) applies to this point. A testator being seised of very considerable real estate and of some mortgages in fee, made a general devise of all his lands, tenements and

(*a*) 2 Vern. 625. *Sed vide* 1 Atk. 605, note.

hereditaments out of settlement, provided the devisee took upon himself the name of Litton, and subject to raise 4000*l.* in case the testator left a daughter. It was contended, that the mortgage in fee passed, but the Court held unanimously that *though forfeited*, the lands in mortgage did not pass by the general devise.

There is, however, no doubt that if a mortgagee in fee devise the mortgage premises by a particular description (*a*), or if he point to them by a locality which cannot be misunderstood, and which does not apply to any other part of his property, both the beneficial and legal interests will pass (*b*); and in a recent case, in which a testator gave all his freehold, copyhold, and leasehold estates by a general description to trustees to found a college, it was held that some old mortgages, *one of which was in fee*, passed under the will to the trustees (*c*); but in order to support this decision, Lord Eldon ultimately *presumed* a release of the equity of redemption of the mortgage in fee, *prior* to the date of the will (*d*).

In modern times, the principal dispute has been, not whether the beneficial interest, but whether the legal interest has passed so as to bring the devisee

(*a*) How v. Vigures, 1 Ch. Rep. 33. Noys v. Mordaunt, 2 Vernon, 581.

(*b*) Clarke v. Abbot, Barnard. Rep., 457. 2 Eq. Ca. Ab. 606. 41. Woodhouse v. Meredith, 1 Mer. 450, *et vide* Martin v. Mowlin, 2 Burr. 969, and Davis v. Gibbs, 3 P. Wms. 26.

(*c*) Attorney-General v. Bowyer, 3 Ves. 724, 725. 5 Ves. 303.

(*d*) Attorney-General v. Vigor, 8 Ves. 277.

as a trustee within the statute of the 7th of Anne; and these cases have in general proceeded on the principles regulating devises of trust estate; the question being, whether a general devise sufficient in terms to comprehend all the testator's real estate, would, of itself, pass the legal fee in lands of which the testator was seised as a mortgagee or trustee. On this point the law has undergone very considerable alterations.

In an early case (*a*), it is laid down that "if a man have lands in fee, and other lands mortgaged to him in fee, by a devise of 'all his lands,' the mortgage would pass; if a man have but the trust of a mortgage of lands in *D.*, and have other lands in *D.*, by a devise of all his lands in *D.*, the trust would pass." In a subsequent case (*b*), a trustee devised as follows: "As to such estate as the Lord had bestowed upon him, he devised part to *I. S.*, and his heirs, and all the rest of his real estate, he devised to his wife and her heirs." The Master of the Rolls said, "Though this be a trust estate, yet the legal estate being in the devisor in the eye of the law, it is *his* estate and *his* property, and therefore passes by the devise of his estate; and if he had devised *all the lands which he had been seised of*, these lands would certainly have passed."

(*a*) Sir Thomas Littleton's Case, 2 Vent. 351. *Vide* the same case under the name of Wynn v. Littleton, 1 Vern 3. and see observations by Mr. Sanders in 1 Atk. 605, on this case and on the case of Strode v. Russell, *supra*.

(*b*) Marlow v. Smith, 2 P. Wms. 198.

The like doctrine was held in a case mentioned in an able note by Mr. Sanders, in his edition of Atkins (*a*), which, in fact, went far beyond the preceding cases, for in that case a mortgagee in fee of lands in Surry, devised all his real estates in Sussex, Kent, and Middlesex, and elsewhere in England, in possession, reversion, or otherwise, to certain uses, under which Thomas Knight, an infant, was then tenant in tail. The mortgage-money was paid to the executor, but the legal estate had not been reconveyed. The question was, whether the legal estate was in the infant; and, if so, whether he could convey by recovery pursuant to the statute. Lord Hardwicke decreed, that the infant should convey the legal estate; and, it appearing under the devise in the will that Thomas Knight, the infant, was tenant in tail, with remainders over, it was ordered that all proper parties should concur in all necessary acts for the infant's suffering a common recovery, in order to make the conveyance effectual (*b*). Previously however to the case of *Ex parte* Bowes, occurred the case of Casborne v. Scarfe (*c*), in which Lord Hardwicke is reported to have said, that by a devise of all lands, tenements, and hereditaments, a mortgage in fee shall not pass; unless (he adds) the equity of redemption be foreclosed; and if, after such devise made, a foreclosure is had, yet such estate shall not pass by those general words of lands, tenements, and heredita-

(*a*) *Ex parte* Bowes, 1 Atk. 605, note.
(*b*) Reg. Lib. A. 1743. fol. 537.
(*c*) 1 Atk. 605.

ments, because a foreclosure is considered *as a new purchase of the land.* Now it has been considered and so stated by a very eminent counsel (*a*), that Lord Hardwicke's opinion in Casborne v. Scarfe was clear, that a mortgage in fee not foreclosed would not pass by a general devise; to which Lord Eldon is reported to have replied, that he did not believe Lord Hardwicke said so, and he would look at his notes. The observation was made by counsel, in reference to the question of the legal interest passing by the general devise; and the answer of the Lord Chancellor is to be considered as confined to that point. Mr. Sanders, in his note to Atkins before referred to, justly remarks, "that the question is, whether we must understand Lord Hardwicke's meaning to be, that the general devise of all lands, tenements, and hereditaments, will neither pass the legal nor beneficial estate of mortgages in fee after forfeiture; or whether those words are only incompetent to pass the beneficial interest. If the latter, he observes, the rule generally speaking is certainly right, because the beneficial interest being, in fact, nothing but the money due on the mortgage, and the lands mortgaged being considered in equity merely as a security for a personal debt, it is very evident that such personal or beneficial interest cannot pass by words peculiarly adapted to transfer real property, unless in some particular instances, as where the testator had no other lands than those mortgaged to him; in which case the manifest intention would hold against the general

(*a*) *Vide* 8 Ves. 436.

construction." Looking, however, at the context, and to the line of reasoning pursued by Lord Hardwicke in Casborne v. Scarfe, it is submitted, that it is manifest his Lordship was referring to the beneficial interest in the land, and was considering the matter in an equitable point of view only. The question before him was, whether a husband was entitled to an estate by curtesy in an equity of redemption; which led him naturally to consider what an equity of redemption was; and his object was to shew that the person entitled to the equity was seised of an actual *estate* in the land, and not of a mere right, as had been argued for the defendant. In support of this doctrine, he makes the assertion alluded to, and then continues in these words, "The interest of the land must be somewhere, and cannot be in abeyance, *but it is not in the* mortgagee, and therefore must remain in the mortgagor; *A.* devises his estate, and after makes a mortgage in fee, though that is a total revocation in law, yet in this Court it is a revocation *pro tanto* only: it is certain the mortgagee is not barely a trustee to the mortgagor, but to some purposes, *videlicet*, with regard to the inheritance, he certainly is, *till a foreclosure.*" Now it is submitted that it is impossible Lord Hardwicke could have been considering the legal interest in these remarks, because, he says, the interest of the land is not in the mortgagee, and cannot be in abeyance, and therefore must be in the mortgagor, which clearly shews the view he was then taking of the case. His argument, in fact, appears to have been this: You say the husband is not entitled to be tenant by the cur-

tesy, because his wife had not *an estate* in the land, but it is clear she had *an estate* in the land, for it was not in the mortgagee as is demonstrated by the fact, that the mortgagee's interest would not pass by a devise in words referrible to real estate, and therefore as the estate cannot be in abeyance, it must be in the mortgagor, and consequently your argument is without foundation. It is submitted that the judgment of Lord Hardwicke in *ex parte* Bowes is not at variance with his opinion in Casborne v. Scarfe. It will be observed that in *ex parte* Bowes, Lord Hardwicke discarded all reference to the *intention* of the testator, it being evident that he could not intend to put the legal estate into strict settlement, but his Lordship decided the case upon the strength of the general terms used by the testator.

The next case in point was heard before Sir Pepper Arden (*a*). A mortgagee in fee bequeathed the mortgage debt to his executors upon certain trusts, and devised all the residue of his estate and effects (subject to the payment of his debts, and to an annuity of 30*l.*) to his sister Elizabeth Watham, her heirs and assigns for ever. He died leaving his sister and his niece (an infant) his co-heirs. The Master reported his opinion to be, that the legal estate passed to the devisee, but if it did not, then he was of opinion the niece was a trustee of one moiety within the 7th Ann. In sup-

(*a*) Duke of Leeds v. Munday, 3 Ves. 348.

port of the Master's opinion, *ex parte* Bowes was cited by Mr. Richards, with whom was the Attorney-General. On the other side, the opinion of Lord Hardwicke in Casborne v. Scarfe was mentioned, and the Attorney-General admitting he could not support the devise, the Master of the Rolls is reported to have said he had no doubt about it, and ordered the infant to convey, and expressed his dissent from the case of *ex parte* Bowes. In reference to this case, however, the Master of the Rolls afterwards took the opportunity of mentioning that the report was not correct, in stating he had no doubt about it (*a*), his idea was that the legal estate did not pass, and he made the order to prevent the party from being turned round on account of a doubt, but he took care to make it conditionally, declaring that the infant was a trustee and mortgagee within the Act, and ordering her to convey, so far as any legal estate in the mortgaged premises descended to her.

The next case (*b*) was also heard before the Master of the Rolls on petition. A mortgagee in fee, devised all the residue of his real and personal estate to his great nephew John Marten Cripps, his heirs, executors, and administrators, and appointed him sole executor. John M. Cripps was an infant. The Master reported his opinion that the legal estate in the mortgage did not pass to the devisee, but descended on the testator's

(*a*) *Vide* 5 Ves. 341.

(*b*) *Ex parte* Sergison, 4 Ves. 147.

heir at law. The Master of the Rolls thought the Master wrong in his judgment, and was of opinion the infant was a trustee, but he could not order him to convey the estate, because, as an executor, he was entitled to the money secured on the mortgage, and he could not permit an infant, though he was an executor, to receive the money (*a*). A petition was then presented to the Chancellor (Loughborough), who seemed inclined to think there was enough in the will to pass the mortgaged estate. It was urged at the bar, that all the late cases required *express* words to make the mortgaged estate pass by the will. The Lord Chancellor said, the best order he could make was to confirm the report, and order the money to be paid into the Bank in the name of the Accountant-General, *ex parte* the infant, and for the parties to take a conveyance from the heir at law, and also from the infant when he came of age, so the title would be good *quâcunque viâ datâ.*

The point in question was next brought under the consideration of a court of law in a case (*b*), in which a man having estates to which he was beneficially entitled in the counties of Wilts and Dorset, and a trust estate in the county of Southampton, devised all the residue of his estates in Wiltshire and Dorsetshire, and elsewhere in England *(after payment of debts, legacies, and funeral expenses,)* to his

(*a*) As to this, *vide supra*, page 360.

(*b*) Roe v. Reade, 8 Term Rep. 118.

son William Reade, his heirs, executors, &c. The question was, whether the trust estate passed by the devise or descended to the testator's heir at law. Lord Kenyon said, the words were sufficiently comprehensive to pass the estate if it could be collected from the will, that the devisor intended it should pass; but in the case of Strong v. Teat(*a*), it was determined that the general words in a will may be restrained in cases where it appears that the devisor did not intend to use them in their general sense. Now in this case, the trustee (the devisor) had no beneficial interest in the land in question, and when he set about to make a disposition of his property by his will, he used general words in the residuary clause, giving all his estates "after payment of his debts, legacies, and funeral expenses." Now these latter governed and restrained the general effect of the former words, and shewed that he only meant to give that in which he had a beneficial interest, and which he had a power of charging with the payment of his own debts. In this opinion Mr. Justice Grose concurred, and a verdict was entered up for the plaintiff. On this case, two important observations obviously present themselves; the first is, that courts of law will recognize a trust, and permit it to sway their decision; and the second is, that it was the opinion of the Court of King's Bench, that a dry legal estate would pass by a general description sufficient to comprize it, if there were not

(*a*) 2 Burr. 912.

evidence of a contrary intention on the face of the will.

Within a few months after the case of Roe v. Reade, the question was again agitated in equity, in a case in which the contrary doctrine was very broadly laid down (*a*). In that case the testator (a trustee) made a general devise of all his real estate, and all his right property and interest therein at law or in equity, unto his second and third sons John and Francis, and their heirs. It was stated at the bar, the rule was, that the general words in a will would not pass trust estates, unless there appeared to be an intention that they should pass. The Lord Chancellor said, that was certainly the understanding at present; perhaps, the more convenient rule would have been the reverse, *as it might be more easy to find a devisee than an heir.* The Attorney-General suggested that the rule that a trust estate should pass by a general devise, would *not* be the most convenient from the frequent instances of estates tail being created by general words, in consequence of which the legal estate might get into an infant fettered by an entail. This case may be considered as going the full extent of the doctrine, that the legal estate would not pass by a general devise, unless an intention to that effect was shewn in the will; and at the same time as

(*a*) Attorney-General v. Buller, 5 Ves. 339.

shifting the ground of argument from the evidence of intention to that of convenience, and raising the question whether it was more convenient that the legal estate should, generally speaking, pass under a general description to a residuary devisee, or descend on the heir at law; or, in other words, whether the probable inconvenience would be greater in the estate being hampered by an entail in an infant under the devise, or in being vested in persons who might be in foreign parts or labouring under other disabilities.

The next case was heard on petition, soon after the elevation of Lord Eldon to the Seals(*a*). In this case the testator had made a general devise and bequest of all the residue of his estate and effects to his *natural son*, George Hall, his heirs executors administrators and assigns, *for his and their own proper use and behoof*, and appointed two other persons executors. Hall afterwards assumed the name of Brettell, and died intestate, leaving issue a son and daughter, both infants. The testator was, at the time of his death, possessed of a mortgage in fee, as a trustee for another. The Master reported his opinion, that the mortgaged estates had passed to Brettell, and were then vested in his infant son. The case of the Attorney-General v. Buller was cited as contradicting *ex parte* Sergison. The Lord Chancellor is reported to have said, "that he rather agreed with what the

(*a*) *Ex parte* Brettel, 6 Ves. 577.

Attorney-General said in Attorney-General v. Buller, for besides an estate tail, you cannot tell how many contingent remainders and executory devises there may be, and it was a strong circumstance that the devisee was a natural child, and if he should die without children, and without a will, the legal estate might go to the Crown. This discussion, he added, began with Sir Thomas Sewell, and his idea was, that the word 'my' would not refer to what was not beneficially his. In this will there are the words 'to and for his and their own proper use and behoof.' Probably the testator meant nothing by that, but a meaning must be attributed to every word." His Lordship rather thought there was not enough to make the infant a trustee; and dismissed the petition.

In a subsequent case (*a*), the whole of this doctrine was reheard and fully considered by Lord Eldon, and the matter placed on a sounder footing. A trust estate having descended on Sir Rowland Alston, as the son and heir of the surviving trustee of the will of Owen Thomas Bromsall, Sir Rowland by his will devised all his real estates whatsoever and wheresoever, unto his wife Dame Gertrude Alston, her heirs and assigns. The question was, whether the legal estate had passed to Lady Alston under the will, or had descended on the co-heirs of Sir Rowland, two of whom were infants, and another a

(*a*) Lord Braybroke v. Inskip, 8 Ves. Jun. 417.

feme covert; so that the degree of inconvenience proved in this case to be on the side of descent. The usual application had been made on petition, for a reference to the Master, to enquire, &c. The Master had reported the legal estate did not pass by the will, and that the infants were trustees within the act. The Master of the Rolls thought the legal estate did pass by the will, and dismissed the petition. After this the matter came on before the Lord Chancellor on exceptions taken to the Master's report; in behalf of the exceptions the cases of Attorney-General v. Buller, and *ex parte* Brettell were cited; and for the plaintiffs the cases of Marlow v. Smith, and Roe v. Reade.

The Lord Chancellor, after premising that he gave an opinion with a great deal of hesitation and difficulty, and stating that the legal estate was either in Lady Alston as devisee, or in two infants and a married woman, and the case therefore raised the question whether the *quantum* of convenience was on one side or the other, said the question must be decided; for it was unseemly, because there were doubts in whom it was vested, to have the money paid into Court, and the infant to convey when of age, as had been done in other cases. His Lordship then proceeded to review all the modern cases. He remarked that in *ex parte* Sergison, the infant being entitled to the money, the ground of Lord Alvanley's decision was, that he was not a dry naked trustee; and that case therefore was not a decision

one way or the other. The case of the Duke of Leeds v. Munday, he remarked, must be attended to with due regard to what was stated in the note to the Attorney-General v. Buller. Besides, there was a circumstance in that case aiding much the decision as evidence of intention, *viz.* that the testator had charged all his (residuary) estates and effects, *with the payment of his debts, and an annuity.* Lord Eldon next remarked on the case of the Attorney-General v. Buller, and on the contradictory assertions in that case, viz. that the trust estates should pass by the general devise, if there was not something upon the face of the will confining it, and the direct contrary as stated on the other side. In respect of which his Lordship observed, "Where the latter position was collected I do not know; no authority was stated for it." He then adverted to the question of convenience and inconvenience, as between devisee and heir, and said, "Upon a limitation of real estates in strict settlement, a vast number of limitations over, contingent remainders, executory devises, powers of jointuracy, leasing, raising sums of money, it was impossible to say the intention could be to give a dry trust estate; for the question attaches as much upon that as upon a mortgage. But if you take a simple case of a testator, having an heir at law, under circumstances in which you cannot get him to execute, abroad; or if the testator did not know him; or as in this instance, two infants and a feme covert, who must levy a fine, then the argument of convenience was all the other way, if the testator gives a mere dry trust estate to an individual competent to do the

acts, and at hand to do them, as Lady Alston was." He next adverted to *ex parte* Brettell, and explained that he did not mean to be understood to put any stress, as he had been understood by the Bar to have done, upon the expression that it was given to the use and behoof of the party. He agreed that giving to a man, his heirs, and assigns, was perfectly the same. His meaning was only that it ought to be a circumstance upon the intention that the testator did not mean a mere dry trust estate. He next proceeded to say, that in the principal case he was disposed to concur with the Master of the Rolls, meaning rather to state his judgment that the rule was not, that in every case where general words are used, the property shall or shall not pass, but that in each case you must look at every part of the will for the intention with regard to such property. He did not know in experience any case in which the proposition was laid down so strong, one way or the other, as it was laid down in the Attorney-General v. Buller. He knew no case that states as the rule, that trust estates shall not pass under general words, unless an intention that they should pass appeared; and he inclined to think they would pass, unless he could collect from expressions in the will, or purposes, or objects of the testator, that he did not mean they should pass. His Lordship added, "The result is this: a will containing words large enough, and no expression in it authorizing a narrower construction than the general legal construction, nor any such disposition of the estate as was unlikely for a testator to make of any property not

in the strictest sense *his*, as complicated limitations; nor any purpose at all inconsistent with as probable an intention to vest it in his wife, as devisee, as to let it descend; *I know of no case in which a mere devise in these general terms, without more, where the question of intention cannot be embarrassed by any reasoning upon the purpose or objects or the person of the devisee has been held not to pass the trust estate.*" He ultimately declared, that upon the best consideration he could give the point, his opinion was, that the trust estate *did pass*, and that he must overturn Roe v. Read, if he should say it did not.

Since the decision in Braybroke v. Inskip, the point appears settled, that if in a will there be a general devise in fee, sufficiently comprehensive to pass the legal interest to the devisee, who is a person *sui juris*, and competent to convey, and the will does not charge the devised estates with debts, legacies, or annuities, and there is not in the whole will any other declared intention inconsistent with a devise of trust or mortgaged estates, then, although there is not in the will any declared intention of the testator to devise the trust or mortgaged estates, they will pass to the devisee; and, in such a case, the concurrence of the heir at law may be dispensed with.

In *ex parte* Morgan (*a*), this doctrine was again recognized. In that case, a mortgagee in fee devised all his real estates to his niece Ann Williams, her

(*a*) 10 Ves. 101.

heirs and assigns, *charged with an annuity of* 20*l.*, and appointed her executrix. Lord Eldon decided the legal estate did not pass, by reason of the annuity, and which, he observed, was not charged on the personal estate. In that case, a further question arose on the will of the heir at law of the mortgagee, who had devised the real estates vested in him by way of mortgage to trustees, upon trust to get in and receive the mortgage money; and the Court determined that this second devise did not comprehend the mortgaged lands, which had descended upon him as heir of the mortgagee.

From the several preceding cases, the following general rules, in addition to that already stated, may perhaps be safely extracted:—

First, that if a mortgagee in fee make an absolute devise of all his real and personal estates to one or more persons, and although charged with debts and legacies, the legal interest in the lands will pass to the devisees, such being consistent with the testator's intention, to enable them to recover the mortgage debt (*a*); but if there is a charge of annuities the point is doubtful.

Secondly, that if the mortgage debt be specifically bequeathed to one person, and there is a general devise of all the testator's real estate to another, or there is

(*a*) *Et vide ex parte* Whitacre, Sanders on Uses, 285, *note.*

no express devise whatever of the testator's real estates, the better opinion perhaps is, that the lands will not pass to the *legatee;* but this is questionable.

Thirdly, that if in the last-mentioned case, there be a general devise of the testator's real estate charged with debts, legacies, or annuities, or in any manner inconsistent with a devise of trust or mortgaged estates, the lands in mortgage will certainly *not* pass to the *devisee.*

Fourthly, that if there be a general bequest of all the testator's personal estate to *A.*, and a simple devise of all his real estate to *B.* it is not clear whether *B.* will take the mortgaged lands as a trustee for *A.*, or whether they will descend on the heir at law; but it is submitted that they will certainly not pass to the *legatee* (*a*).

It has now become a very general practice with conveyancers to except the testator's mortgaged and trust estates out of a general devise in his will, and to insert an express devise of these estates to trustees, with a declaration that the money secured upon the mortgages shall be considered as part of his personal estate.

If a mortgagee obtain an absolute decree of foreclosure, or a release of the equity of redemption, or even

(*a*) *Vide* 1 Atk. 605. *note.* Co. Lit. 205. *note.*

become absolutely entitled by length of possession as before explained, *prior* to the date of his will, a general devise of all his lands, tenements, and hereditaments, although in strict settlement, will, it is conceived, unless he manifest an express intention to the contrary, pass the mortgaged lands both at law and in equity; but if at the time of the will he be not so absolutely entitled, then it is conceived that a *subsequent* foreclosure, or release (unless the will be republished) will not confer on the devisee the beneficial estate, *because a foreclosure is considered as a new purchase of the land* (*a*). The consequence will be, that if the legal interest in mortgaged lands shall by a general description, have passed at law to the devisee, and the mortgagee shall afterwards obtain a release or foreclosure of the equity of redemption, or shall become absolutely entitled by lapse of time, and shall die without a republication of his will, the devisee will become a trustee for the testator's heir at law, even although the devisee be also the executor or residuary legatee. The author would have considered this a clear point; but he observes that the author of a recent publication (*b*), appears to have arrived at a different conclusion and cites as an authority the case of Attorney-General v. Bowyer (*c*).

In that case it appeared that Sir George Downing

(*a*) *Vide* Casborne v. Scarfe, 1 Atk. 606. Strode v. Russel, 2 Vern. 625.

(*b*) Patch on Mortgages, 140.

(*c*) 3 Ves. 714. 724. 725. 5 Ves. 300. 308. 8 Ves. 277.

being seised of large real estates and of a mortgage in fee executed in the year 1694, by his will in 1717, devised all his real estates to Sir Jacob Downing, (who was his heir at law) for his life, with various remainders over all of what failed, with remainder to trustees in fee to found a college, and he gave all his personal estate to Sir Jacob, and appointed him executor. The testator died in the year 1749; Sir Jacob died in 1764, having given all his real and personal estate to his widow absolutely. One question raised was, whether this old mortgage passed to the trustees for the college. Lady Downing in her answer, stated she did not believe there was any release of the equity of redemption. Lord Loughborough said, that considering the length of time, he had no difficulty in holding, that the lands constituted part of the testator's estate and passed by his will. The cause again came on to be heard before the same judge for further directions, and it was contended that in 1717, the mortgage passed as personal estate to Sir Jacob, and from him to Lady Downing. Lord Loughborough admitted, that at the date of the will it was money, but said that by a release of the equity of redemption, it would go to the devisee; and if the testator lived the period when all the equity of redemption was gone, then it existed no more as part of his (personal) property, but as land, and he (Lord Loughborough) would never take it up again as money, "there is no equity," he added, "between the heir and executor, or the devisee and executor." The report afterwards states that his Lordship said, "the mortgagee's title to it as land

was antecedent to the will, and his Lordship could not tell the point of time at which it became land; he could find no other date at which the title accrued to the mortgagee, but the date of the conveyance which was antecedent to the will." Now, this latter part of the judgment is apparently at variance with the first part, in which his Lordship is made to admit that it was money and not land at the date of the will. Besides, it is remarkable that his Lordship only puts the case as between the heir or devisee and executor, and not between the devisee and the heir at law. The point was re-heard before Lord Eldon, who surmounted the whole difficulty, *by presuming a release of the equity of redemption prior to the date of the will.* It is therefore submitted that the law remains as laid down in Casborne v. Scarfe, and Strode v. Russel. In a very recent case (*a*), it was held that lands in mortgage would not pass under a general devise of real estate in strict settlement, in a will executed subsequently to a decree to account, but prior to the final order for foreclosure. In another case (*b*), in which a will made subsequently to an order for foreclosure *nisi*, contained a specific devise of the mortgaged lands, but the devisor died before an account taken, or an order obtained for absolute foreclosure, it was held that as between the devisor and devisee, the mortgaged estate should be considered as realty, but should be personal estate for the benefit of

(*a*) Thompson v. Grant, 4 Madd. 438.
(*b*) Garret v. Evers, Mosel. 364.

creditors. This decision, it will be observed, does not in the least interfere with the case of Thompson v. Grant, or the doctrine in Casborne v. Scarfe, and Strode v. Russel.

A bequest of money secured on mortgage is within the Mortmain Act, 9 Geo. II. (*a*).

A bequest of the principal of a mortgage debt will not pass the arrears of interest (*b*), and a bequest of the arrears of a mortgage will carry the interest only (*c*).

(*a*) Attorney-General v. Meyrick, 2 Ves. 44.
(*b*) Roberts v. Kyffin, Barn. 259. 2 Atk. 113.
(*c*) Hamilton v. Lloyd, 2 Ves. Jun. 416.

MISCELLANEOUS CHAPTER.

A few subjects remain to be noticed, not expressly applying to any of the former divisions of this work.

By the 59th Geo. III. c. 120, being an Act for establishing a registry of colonial slaves in Great Britain, the king is authorized by warrant under the hand and seal of one of the principal secretaries of state, to appoint some fit and proper person in England to be the registrar of colonial slaves, and an office is directed to be provided, and copies and duplicates of registries of slaves in the colonies received by the secretaries of state are to be handed over to the registrar, who is, on request, to make search concerning any slaves registered or supposed to be registered in his books, and give a certificate of the search and an extract (if found) from the register, on being for every such search, certificate, and extract, paid such sums as shall be appointed in a schedule of fees fixed by the commissioners of the treasury. This Act then proceeds to enact, that, after the 1st day of January, 1820, it shall not be lawful for any of his majesty's subjects in the United Kingdom, to purchase, or to lend or advance any money, goods or effects, upon the security of any slaves in any of his

majesty's colonies or foreign possessions, unless such slaves shall appear by the return received therein, to have been first duly registered in the said office of the registrar of colonial slaves; and that every sale, mortgage and conveyance, or assurance of, and every charge or other security upon any slave or slaves not so appearing to be registered, which, at any time or times after the said 1st day of January, 1820, shall be made or executed within the United Kingdom to or in trust for any of his majesty's subjects, shall be absolutely null and void in respect of any such unregistered slave or slaves; *and that for this purpose, no slave or slaves shall be deemed and taken to be duly registered, unless it shall appear that a return of such slave or slaves duly made by the owner or owners, or other persons in his or their behalf, in the manner and form required by law, in the colony in which such slave or slaves may reside, or a copy or abstract of such return, shall have been received in the office of the said registrar, from the colony in which such slave or slaves shall reside, within the four years next preceding the date of such sale, mortgage, conveyance, or assurance, charge or security as aforesaid.* And further, that after the said 1st day of January, 1820, no deed or instrument made or executed within the United Kingdom, whereby any slave or slaves in any of the said colonies shall be intended to be mortgaged, sold, charged, or in any manner transferred or conveyed, or any estate or interest therein created or raised, shall be good or valid in law, to pass or convey, charge or affect any such slave or slaves, *unless the registered name and description, or names*

and descriptions of such slave or slaves shall be duly set forth in such deed or instrument, or in some schedule thereupon indorsed, or thereto annexed, according to the then latest registration, or corrected registration, of such slave or slaves in the said office of the registrar of slaves, but it is provided, that no deed or instrument shall be avoided or impeached, by reason of a clerical error in setting forth the names and descriptions of any slave or slaves therein, or in any schedule thereto contained; nor shall the same be avoided or impeached by reason of any disagreement between the names and descriptions, and the entries thereof in the books of registry, or duplicate registry, which shall have arisen from any error or default of the registrar, his assistants, or clerks, in extracting and certifying the said names and descriptions, without the fraudulent contrivance or wilful default of the parties to such deed or instrument. And also, that nothing therein contained shall extend to or be construed to hinder or prevent the transfer or assignment of any security, mortgage, or charge, of or upon slaves granted, made, created or executed *antecedently to the passing of that Act;* nor to avoid any deed or instrument whereby such security, mortgage or charge should be thereafter transferred, nor to avoid, hinder or impeach any will, codicil, or other testamentary paper, or any probate or letters of administration, or any bill of sale, assignment, conveyance or instrument made by or under the authority of any commission of bankrupt, or any public officer appointed to assign or convey any insolvent's

estate and effects, or by or under the authority of any court of justice, or any officer thereof, or in the execution of any legal process, by reason that the registered names and descriptions of any slaves are not set forth in such deed, will, codicil, testamentary paper, probate, letters of administration, bill of sale, assignment, conveyance, or instrument. And it is further enacted, that *the issue* of any slave or slaves named or described in any deed or instrument executed in the United Kingdom, or any schedule thereto, born after the return required by law in the colony in which such slave or slaves may be resident, *who shall afterwards be duly registered in the next return required by law in the said colony*, shall be deemed and considered to pass, and be conveyed and affected as registered slaves by such deed or instrument, as effectually to all intents and purposes, as if such issue were therein named and described.

No case has occurred of which the author is aware upon this statute. Its provisions must, of course be strictly attended to in mortgages of West India estates.

The following observations apply to the appointment of a receiver by a Court of Equity, on application by the mortgagee. In reference to which, the rules appear to be that if the mortgagee, *having the legal estate*, neglect to take the precaution of an agreement with the mortgagor for the appointment of a receiver, he cannot obtain such appointment by order

of the Court, but must proceed to eject the mortgagor (*a*); if the first mortgagee be in possession, the Court will not, in general, on the application of a subsequent mortgagee, appoint a receiver (*b*), but the second mortgagee must redeem the first; and a charge of mismanagement and collusion is not sufficient ground on motion before answer, to take the possession from him (*c*). But if the first mortgagee be not in possession, a second mortgagee may have a receiver, without prejudice to the rights of the first (*d*).

When a receiver has been appointed by the Court, it would be contempt in the first mortgagee to proceed in ejectment, without the consent of the Court (*e*); and upon his application for such purpose the course has been either to permit him to bring ejectment, or to be examined *pro interesse suo* (*f*).

An examination *pro interesse suo* proceeds by interrogatories, and a reference to the Master to report,

(*a*) Berney v. Sewell, 1 Jac. and Walk. 647.

(*b*) Berney v. Sewell, *supra*, *et vide* Codrington v. Parker, 16 Ves. 469. Quarrell v. Beckford, 13 Ves. 377.

(*c*) Berney v. Sewell, *supra*.

(*d*) Berney v. Sewell, *supra*. Bryan v. Cormick, 1 Cox, 422. Dalmer v. Dashwood, 2 Cox, 378, *et vide* Phipps v. Bishop of Bath and Wells, 2 Dick, 608. Price v. Williams, Cooper, C. C. 31. Archdeacon v. Bowes, 3 Anstr. 752.

(*e*) Brooks v. Greathed, 1 Jac. and Walk. 178. Angell v. Smith, 9 Ves. 335. Anon. 6 Ves. 287. Bryan v. Cormick, *supra*.

(*f*) *Vide* 1 Jac. and Walk. 178. 9 Ves. 338.

if the claimant has made good his title, and the report is set down for directions, and a final order made (*a*). It is not regular to take *exceptions* to the report (*b*). The order will be made as well against a receiver as sequestrators (*c*), and the effect of such an examination may in general be obtained on motion or petition (*d*).

After the master's report has been confirmed, a reference to him may be obtained to calculate principal and interest and costs, and the rents in the receiver's hands are to be applied, first, in payment of costs and then in reduction of the mortgage, and possession will be given up (*e*).

A receiver appointed by the Court should enter into a recognizance with two sureties (*f*), and the tenants are ordered to attorn, and pay their rents to him (*g*). If it is intended that his duty should exceed keeping down the interest, the order should specify it (*h*).

A receiver appointed on behalf of several mort-

(*a*) Hunt v. Priest, 2 Dick. 540.

(*b*) Hamlyn v. Lee, 1 Dick. 94.

(*c*) Gomme v. West, 2 Dick. 472.

(*d*) Walker v. Bell, 2 Madd. 21. Dixon v. Smith, 1 Swans. 457. Dickenson v. Smith, 4 Madd. 177. *Et vide* 1 Jac. and Walk. 179. n.

(*e*) Walker v. Bell, *supra*.

(*f*) Mead v. Lord Orrery, 3 Atk. 244.

(*g*) Rowley v. Ridley, 2 Dick. 630.

(*h*) Gresley v. Adderley, 1 Swanst. 579.

gagees, cannot be discharged without the consent of all (*a*).

A bond by the mortgagor for performance of the covenants and conditions in the mortgage-deed, would be forfeited by breach of the *proviso* in the deed for payment of the money (*b*); at the present day, the practice is to give a bond for the debt and interest, which should bear even date with the mortgage to exempt it from the duty (*c*).

(*a*) Largan v. Bower, 1 Sch. and Lef. 296.

(*b*) Tooms v. Chandler, 2 Lev. 116. 3 Keb. 387. *contra* Briscoe v. King, Cro. Jac. 281. Yelv. 206.

(*c*) *Vide* 55 Geo. III. cap. 184.

APPENDIX.

APPENDIX.

No. I.—*Vide page* 108.

Power of Attorney in Ejectment.

WHEREAS by indentures of lease and release bearing date respectively the day next before and even date with these presents the release being of three parts and made or expressed to be made between me the undersigned *R. A.* of *D.* in the county of *D.* esquire of the first part *S. H.* gentleman of the second part and *H. B.* esquire of the third part The messuage or tenement closes pieces or parcels of land and hereditaments therein particularly mentioned situate lying and being at *L.* in the county of *B.* have in consideration of the sum of 2000*l.* paid by the said *H. B.* to me the said *R. A.* been appointed released and conveyed by or by the direction of me the said *R. A.* to the use of the said *H. B.* his heirs and assigns for ever subject to a proviso or condition and covenant or agreement in the said indenture of release contained for the redemption of the said premises on payment by me the said *R. A.* my heirs executors or administrators unto the said *H. B.* his executors administrators or assigns of the sum of 2000*l.* on the day of next ensuing with interest for the same after the rate of *5l. per cent. per annum* by equal half-yearly payments on the day of and the day of without any deduction or abatement whatsoever And whereas I the said *R. A.* have further agreed to secure the payment of the said sum of 2000*l.* and the interest for the same by my warrant of attorney

with judgment to be entered up in pursuance thereof in his Majesty's Court of King's Bench at Westminster as of Hilary Term next or of some subsequent term in an action of trespass and ejectment against me the said *R. A.* at the suit of the said *H. B.* his heirs or assigns for recovery of the said premises Now therefore these are to desire and authorize you the attornies above-named or any one of you or any other attorney of the Court of King's Bench aforesaid to appear for me the said *R. A.* in the said court as of Hilary Term next or of any other subsequent term and then and there to receive a declaration for me the said *R. A.* in an action of trespass and ejectment of a farm at the suit of John Doe on the demise of the said *H. B.* his heirs or assigns for two messuages two curtilages six yards six barns six cowhouses six hovels four stables six gardens six orchards one hundred acres of land one hundred acres of pasture one hundred acres of arable land ninety acres of furze and heath and common of pasture for all manner of cattle with the appurtenances situate lying and being at *L.* and in the county of *B.* which the said *H. B.* his heirs or assigns on the day of had demised to the said John Doe for the term of fourteen years from the day of and thereupon to confess the same action or else to suffer judgment by *nil dicit* or otherwise to pass against me the said *R. A.* in the same action to be thereupon forthwith entered up against me the said *R. A.* of record in the said Court for the recovery of the said term yet to come of and in the said tenements with the appurtenances and also for the recovery of 40*s.* damages besides costs of suit And I the said *R. A.* do hereby authorize you my said attornies or any one of you after the said judgment shall be entered up as aforesaid for me and in my name and as my act and deed to sign seal and execute a good and sufficient release in the law to the said *H. B.* his heirs executors administrators and assigns of all and all manner of error and errors writ and writs of error

and all benefit and advantage thereof and all misprisions whatsoever had made committed done or suffered or to be had made committed done or suffered in or about touching or concerning the aforesaid judgment or in or about touching or concerning any writ warrant process declaration plea entry or other proceedings whatsoever of or in anywise concerning the same And for what you my said attornies or any of you shall do or cause to be done in the premises or any of them this shall be to you and every of you a sufficient warrant and authority And it is hereby declared that the judgment so to be entered up against the said *R. A.* as aforesaid is to be as and for a further security for the payment of the said sum of 2000*l.* and the interest for the same and that no execution shall be issued or taken out upon the said judgment unless and until the interest of the said sum of 2000*l.* or some part thereof shall be in arrear for the space of three calendar months next after any of the days or times in the said indenture of mortgage and hereinbefore mentioned for the payment of the same or unless and until default shall be made by the said *R. A.* his heirs executors administrators and assigns at any time after the said day of (in the said indenture of release and mortgage mentioned and appointed for the payment of the said sum of 2000*l.*) in payment of the aforesaid sum of 2000*l.* or any part thereof for the space of three calendar months next after the date of any notice or writing given or caused to be given by the said *H. B.* his executors administrators or assigns to or left by him or them at the usual or last known place of abode or residence of the said *R. A.* his heirs executors administrators or assigns or any of them requiring the payment of the same And I the said *R. A.* do hereby declare that it shall not be necessary for the said *H. B.* his heirs executors administrators or assigns to revive or cause to be revived the said judgment or do any act matter or thing to keep the same on foot although the same shall be entered

of record for the space of one year and upwards and that I the said *R. A.* my heirs executors and administrators shall not nor will have receive or take any plea exception proceeding or other benefit from the omission of the said *H. B.* his heirs executors administrators or assigns to revive the said judgment although the same shall have been entered for the space of one year or upwards And that if I the said *R. A.* my heirs executors or administrators shall attempt so to do by action or other legal proceeding or proceedings whatsoever this present agreement shall and may be pleaded or shewn in bar thereto any rule or practice of the Courts or any of them to the contrary thereof in anywise notwithstanding In witness &c.

No. II.—*Vide page* 109.

This indenture made &c. between *A. B.* of the one part and *C. D.* of the other part witnesseth that in consideration of the sum of *l.* of lawful money of Great Britain by the said *C. D.* to the said *A. B.* at or immediately before the sealing and delivering of these present in hand well and truly paid the receipt whereof he the said *A. B.* doth hereby acknowledge and of and from the same doth acquit release and discharge the said *C. D.* his heirs executors administrators and assigns for ever by these presents he the said *A. B.* hath granted bargained sold and demised and by these presents doth grant bargain sell and demise unto the said *C. D.* his executors administrators and assigns all &c. and all houses &c. and the reversion &c. and all the estate &c. to have and to hold the said messuage or tenement lands hereditaments and all and singular other the premises hereby granted and demised unto the said *C. D.* his executors administrators and assigns henceforth for and during the full end and term of one thousand years without impeachment of

waste subject to the proviso or condition and covenant or agreement hereinafter contained for redemption of the premises Provided always and it is hereby agreed and declared between and by the said parties to these presents that if the said *A. B.* his heirs executors administrators or assigns do and shall on the day of which will be in the year well and truly pay or cause to be paid unto the said *C. D.* his executors administrators or assigns the sum of *l.* of lawful money of Great Britain and do and shall in the mean time well and truly pay or cause to be paid unto the said *C. D.* his executors administrators and assigns interest for the same after the rate of 5*l.* for every 100*l.* by the year from the day of the date of these presents by equal half-yearly payments on the day of and the day of without any deduction or abatement whatsoever then and in that case and immediately after such payments shall be so made the said term of one thousand years shall absolutely cease and determine And the said *A. B.* doth hereby for himself his heirs executors administrators and assigns covenant promise and agree with and to the said *C. D.* his executors administrators and assigns that the said *A. B.* his heirs executors administrators or assigns shall and will well and truly pay or cause to be paid to the said *C. D.* his executors administrators or assigns the aforesaid sum of *l.*, and the interest for the same after the rate at the days or times and in manner hereinbefore mentioned and appointed for payment of the same respectively And the said *A. B.* for himself his heirs executors administrators and assigns doth further covenant promise and agree with and to the said *C. D.* his executors administrators and assigns by these presents in manner following (that is to say) that he the said *A. B.* now hath in himself good right full power and lawful and absolute authority to grant and demise the hereditaments and premises hereby granted and demised or intended so to be with their appurtenances,

unto the said *C. D.* his executors administrators and assigns for the said term of one thousand years according to the true intent and meaning of these presents And that if default shall be made in payment of the said sum of *l.* or the interest for the same or any part thereof respectively contrary to the aforesaid proviso or condition and covenant or agreement for payment of the same it shall be lawful for the said *C. D.* his executors administrators and assigns at any time or times thereafter into and upon the hereditaments and premises hereby granted and demised or any part thereof to enter and the same peaceably and quietly to have hold occupy possess and enjoy and receive and take the rents issues and profits thereof to and for his and their own use and benefit for and during all the rest residue and remainder which shall be then to come and unexpired of the said term of one thousand years without any let suit trouble interruption or disturbance whatsoever of from or by the said *A. B.* his heirs executors administrators or assigns or any other person or persons whomsoever and that free and clear and freely clearly and absolutely acquitted exonerated and discharged or otherwise by the said *A. B.* his heirs executors administrators or assigns well and sufficiently saved protected kept harmless and indemnified of from and against all and all manner of former and other gifts grants bargains sales jointures dowers mortgages uses wills entails annuities rentcharges rent-seck and arrears of rent fines issues amerciaments statutes recognizances judgments executions extents and all other titles troubles charges debts and incumbrances whatsoever And moreover that he the said *A. B.* and his heirs and all and every persons and person whosoever having or lawfully or equitably claiming or who shall or may have or lawfully or equitably claim any estate right title or interest in or to the said hereditaments and premises hereby granted and demised, or intended so to be or any of them, or any part thereof shall and will from time to time and at all times thereafter

upon the request of the said *C. D.* his executors administrators or assigns make do and execute or cause and procure to be made done and executed all and every such further and other lawful and reasonable acts deeds matters things conveyances and assurances in the law whatsoever for the further better more perfectly and absolutely conveying and assuring of the said hereditaments hereby granted and demised or intended so to be with their appurtenances unto the said *C. D.* his executors administrators and assigns for and during all the residue and remainder which shall be then to come and unexpired of the said term of 1000 years, or for conveying and assuring unto the said *C. D.* his heirs and assigns or unto such person or persons as the said *C. D.* his executors administrators or assigns shall in that behalf order and direct the freehold and inheritance in reversion immediately expectant on the expiration or sooner determination of the said term of 1000 years of and in the said hereditaments as by the said *C. D.* his executors administrators or assigns or his or their counsel in the law shall be reasonably devised or advised and required Provided always and it is hereby further agreed and declared between and by the said parties to these presents that it shall be lawful for the said *A. B.* his heirs and assigns peaceably and quietly to have hold occupy possess and enjoy the said hereditaments hereby granted and demised or intended so to be with their appurtenances and receive and take the rents issues and profits thereof and every part thereof to and for his and their own use until default shall be made in payment of the said sum of *l.* or the interest for the same or some part thereof respectively contrary to the aforesaid proviso or agreement and covenant for payment of the same respectively without any let suit trouble or disturbance of from or by the said *C. D.* his executors administrators or assigns or any other person or persons whomsoever lawfully claiming

or to claim by from or under him or them or any of them In witness &c.

No. III.—*Vide page* 110.

LIMIT one moiety to the use of *A. B.* for 1000 years remainder to *C. D.* in fee

And the other moiety to *C. D.* for 1000 years remainder to *A. B.* in fee

Proviso If mortgagor &c. shall pay &c. to *A. B.* then and in that case and immediately thereupon the said term of 1000 years hereinbefore limited to the said *A. B.* his executors administrators and assigns of and in the first hereinbefore limited moiety of and in the said manor &c. shall absolutely cease and determine And the said *A. B.* his heirs and assigns shall &c. convey the freehold and inheritance of and in the lastly hereinbefore limited moiety of and in the said manor &c. unto the said (mortgagor) his heirs and assigns or as he or they shall direct or appoint Covenant from mortgagor with *A. B.* to pay &c.

Proviso If mortgagor &c. shall pay &c. to *C. D.* then and in that case and immediately thereupon the said term of 1000 years hereinbefore limited to the said *C. D.* his exetors administrators and assigns of and in the secondly hereinbefore limited moiety of and in the said manor &c. shall absolutely cease and determine And the said *C. D.* his heirs and assigns shall &c. convey the freehold and inheritance of and in the firstly hereinbefore limited moiety of and in the said manor &c. unto the said (mortgagor) his heirs and assigns or as he or they shall direct or appoint Covenant with *C. D.* to pay &c.

No. IV.—*Vide page* 127.

Covenant to renew.

And the said (mortgagor) for himself his heirs executors administrators and assigns doth covenant promise and agree with and to the said (mortgagee) his executors administrators and assigns by these presents in manner following (that is to say) That he the said (mortgagor) his executors administrators and assigns shall and will from time to time and at any time hereafter at his or their own proper costs and charges join and concur with the said (mortgagee) his executors administrators or assigns in all lawful and necessary acts deeds matters and things whatsoever whether the same be by surrender or otherwise for obtaining or procuring a renewal or renewals of the subsisting lease for the time being of the aforesaid premises unto the said (mortgagee) his executors administrators or assigns subject to the subsisting right title or equity of redemption of him the said (mortgagor) his executors administrators and assigns under or by virtue of these presents And that in case the said (mortgagor) his executors administrators or assigns shall after notice in writing to him or them given by the said (mortgagee) his executors administrators or assigns requiring the said (mortgagor) his executors administrators or assigns to join or concur in any such acts deeds matters or things for the purpose aforesaid refuse decline or neglect to join and concur therein it shall be lawful for the said (mortgagee) his executors administrators or assigns at his or their sole discretion or of his or their sole authority by surrender assignment or other disposition of the then subsisting interest in the aforesaid premises or otherwise to obtain or procure a renewal or renewals from time to time of the subsisting lease of the said premises subject to such right title and equity of redemption as aforesaid And it

is hereby agreed and declared that all the costs charges and expences of the said (mortgagee) his executors administrators or assigns in or about the procuring or obtaining any such renewal or renewals as aforesaid shall be a charge on the aforesaid premises together with interest for the same after the rate of *5l. per cent. per annum* from the time or respective times of the payment of such costs charges and expences respectively and the aforesaid premises shall not be redeemed or redeemable until payment by the said (mortgagor) his heirs executors administrators or assigns unto the said (mortgagee) his executors administrators or assigns of the amount of such costs charges and expences and the interest for the same as well as the said sum of *l.* hereby intended to be secured and the interest for the same in manner aforesaid and according to the true intent and meaning of these presents.

No. V.—*Vide page* 237.

Covenant by Mortgagor of a Church Living not to resign, &c. without consent, and to charge his new Benefice if promoted.

THAT the said *A. B.* shall not nor will at any time while the said sum of *l.* or the interest for the same or any part thereof respectively shall remain charged on the rectory hereditaments and premises comprized in the said term of 100 years cede or resign the said rectory or do or cause to be done any act matter or thing whatsoever by reason whereof he may lose or be deprived of or removed from the same without the consent in writing of the said *C. D.* his executors administrators or assigns first had and obtained And that in case the said *A. B.* shall at any time during the period aforesaid be preferred or promoted to any other ec-

clesiastical benefice and shall be obliged to resign or be deprived of the said rectory tythes and premises comprized in the said term of 100 years Then and in such case he the said *A. B.* shall and will at his own costs and charges when required so to do by the said *C. D.* his executors administrators or assigns well and effectually grant bargain sell and demise such benefice to which the said *A. B.* shall be promoted or preferred as aforesaid and the lands tythes and other hereditaments belonging thereto and the profits thereof to the said *C. D.* his executors administrators or assigns in such manner as he or they or his or their counsel in the law shall require or advise for better securing unto the said *C. D.* his executors administrators and assigns the payment of the said sum of *l.* and the interest for the same or so much thereof respectively as shall then remain due and owing.

No. VI.—*Vide page* 247.

General Order.

And I do further order, that upon application to the major part of the commissioners named in any commission of bankrupt by any person or persons claiming to be a mortgagee or mortgagees of any part of the bankrupt's estate or effects the said commissioners shall proceed to inquire whether such person or persons is or are a mortgagee or mortgagees of any part of the bankrupt's estate or effects, and for what consideration and under what circumstances and if the commissioners shall find such person or persons is or are a mortgagee or mortgagees of any part of the bankrupt's estate or effects and no sufficient objection shall appear to the title of such mortgagee or mortgagees to the sum claimed by him or them under such mortgage or mortgages that the commissioners do then proceed to take an account of the principal interest and costs due upon such mortgage or mortgages and

of the rents and profits of the mortgaged premises received by such mortgagee or mortgagees or by any other person or persons by his their or any of their order or for his their or any of their use in case such mortgagee or mortgagees shall have been in possession of the mortgaged premises or of any part thereof and that the commissioners do then cause due notice to be given in the London Gazette and in such other of the public papers as they shall think fit when and where the said mortgaged premises are to be sold before them or by public auction at any other place or places if they shall so think fit and that such sale be made accordingly And I do further order that all proper parties do join in the conveyance or conveyances to the purchaser or purchasers as the said commissioners shall direct And I do further order that the monies to arise from such sale be applied in the first place in payment of the expences attending such sale and then in payment and satisfaction of what shall be found due to such mortgagee or mortgagees for principal interest and costs and that the surplus of the said monies (if any) be paid to the assignees of the estate and effects of the said bankrupt but in case the monies to arise from such sale shall be insufficient to pay and satisfy what shall be so found due to such mortgagee or mortgagees I do order that such mortgagee or mortgagees be admitted a creditor or creditors under such commission for such deficiency and to receive a dividend or dividends thereon out of the bankrupt's estate or effects rateably and in proportion with the rest of the creditors seeking relief under the said commission but so as not to disturb any dividend or dividends then already made And for the better making such inquiry and taking such account as aforesaid and making a title to such purchaser or purchasers I do order that all parties be examined by the said commissioners upon interrogatories or otherwise as the commissioners shall think fit and do produce before the said commissioners upon oath all deeds papers and writings in their respective custody

or power relating to the estate or effects of the said bankrupt or bankrupts as the commissioners shall direct.

Loughborough, C.

No. VII.—*Vide page* 309.

Mortgage in Fee for securing the Re-transfer of 3000*l.* *3l. per cent. Reduced Bank Annuities and the payment of Dividends in the mean time.*

THIS Indenture &c. between Thomas Brown of &c. gentleman of the one part and James Smith of &c. gentleman of the other part whereas the said Thomas Brown having occasion for the loan of a sum of money the said James Smith at his request hath sold out 3000*l.* *3l. per cent.* Reduced Bank Annuities lately standing in the name of the said James Smith in the books of the Governor and Company of the Bank of England and which after payment of the broker's commission and other incidental expences of sale produced the sum of *l.* which the said James Smith hath paid into the hands of the said Thomas Brown as he doth hereby admit and acknowledge And whereas it was agreed at the time of the treaty for the loan that the re-transfer of the said 3000*l.* *3l. per cent.* Reduced Bank Annuities and the payment of dividends in the mean time should be secured as well by the bond and covenant of the said Thomas Brown as also by way of mortgage as hereinafter is mentioned Now this indenture witnesseth that in pursuance of the said agreement on the part of the said Thomas Brown and in consideration of the said sum of *l.* of lawful money of Great Britain the produce of the said 3000*l.* 3 *per cent.* Reduced Bank Annuities this day paid by the said James Smith unto the said Thomas Brown as hereinbefore is mentioned the sale of which said 3000*l.* 3 *per cent.* Reduced Bank Annui-

ties and receipt of the said sum of *l.* in manner aforesaid he the said Thomas Brown doth hereby admit and acknowledge and of and from the same and every part thereof doth acquit release and discharge the said James Smith his heirs executors administrators and assigns for ever by these presents He the said Thomas Brown hath granted bargained sold aliened released and confirmed and by these presents doth grant bargain sell alien release and confirm unto the said James Smith in his actual possession &c. all, &c. and all houses &c. and the reversion &c. and all the estate &c. to have and to hold the messuages or tenements lands hereditaments and all and singular other the premises hereby granted and released or expressed and intended so to be with their appurtenances (free from all incumbrances whatsoever) unto and to the use of the said James Smith his heirs and assigns for ever but subject nevertheless to the proviso or condition and covenant or agreement hereinafter contained for redemption of the premises Provided always and it is hereby agreed and declared between and by the parties to these presents That if the said Thomas Brown his heirs executors or administrators do and shall on the thirteenth day of February which will be in the year 1822 or in case the books of the said Governor and Company of the Bank of England for the transfer of 3 *per cent.* Reduced Bank Annuities shall be then closed then do and shall on the first day after the said thirteenth day of February on which such books shall be open for making transfers of such stock well and truly transfer or cause to be transferred 3000*l.* 3 *per cent.* Reduced Bank Annuities in the said books of the said Governor and Company into the name or names of the said James Smith his executors administrators or assigns and do and shall in the mean time and from time to time well and truly pay or cause to be paid unto the said James Smith his executors administrators or assigns such sum or sums of money as shall be equivalent to the dividends which

would have become payable unto him or them in respect of the said first-mentioned 3000*l.* 3 *per cent.* Reduced Bank Annuities in case the same had not been so sold out as aforesaid on or at the like days or times and in the like shares and proportions on or at and in which such dividends would have become payable in case such sale had not been so made as aforesaid without any deduction or abatement whatsoever out of the same or any part thereof respectively for or in respect of any taxes charges assessments payments or impositions whatsoever already taxed charged assessed or imposed or to be taxed charged assessed or imposed on the messuages or tenements and other hereditaments hereby granted and released or expressed and intended so to be or upon the said 3000*l.* 3 *per cent.* Reduced Bank Annuities so to be transferred as aforesaid or on the said sum or sums of money to be paid by way of dividends thereon or any part thereof respectively or upon the said James Smith his heirs executors administrators or assigns or any other person or persons for upon account or in respect of the said messuages or tenements land and other hereditaments or of the said last-mentioned 3000*l.* 3 *per cent.* Reduced Bank Annuities or of the said sum or sums of money to be paid by way of dividends thereon or any part thereof respectively by authority of Parliament or otherwise howsoever or for upon account or in respect of any other matter cause or thing whatsoever Then and in such case the said James Smith his heirs or assigns shall and will at any time after such transfer and payment shall be so respectively made as aforesaid upon the request and at the proper costs and charges of the said Thomas Brown his heirs executors administrators or assigns re-convey the said messuages or tenements lands and other hereditaments with their appurtenances unto the said Thomas Brown his heirs and assigns or as he or they shall in that behalf order or direct free from all incumbrances whatsoever made done or committed by the said James Smith

his heirs executors administrators or assigns And the said Thomas Brown doth hereby for himself his heirs executors and administrators covenant promise and agree with and to the said James Smith his executors administrators and assigns that he the said Thomas Brown his heirs executors administrators or assigns or some or one of them shall and will well and truly transfer or cause to be transferred into the name or names of the said James Smith his executors administrators or assigns the said last-mentioned 3000*l.* 3 *per cent.* Reduced Bank Annuities in manner aforesaid and on or at the day or time hereinbefore mentioned and appointed for the transfer of the same and in the mean time well and truly pay or cause to be paid unto the said James Smith his executors administrators and assigns such a sum or sums of money by way of dividends in respect of the same 3000*l.* 3 *per cent.* Reduced Bank Annuities on or at such days or times and in such shares and proportions as is and are hereinbefore also mentioned and appointed for the payment of the same respectively (The usual covenants for title and for quiet enjoyment by the mortgagor until default) In witness &c.

Bond in the penal Sum of 6000*l.* for the re-transfer of 3000*l.* 3 *per cent.* Reduced Bank Annuities and the payment of Dividends in the mean time

Thomas Brown of the parish of in the county of gentleman } Bond in the penal sum of 6000*l.*
To
James Smith of gentleman }

Whereas the above bounden Thomas Brown having occasion for the loan of a sum of money the above named James Smith at his request hath sold out 3000*l.* 3 *per cent.* Reduced Bank Annuities lately standing in his name in the books of the Governor and Company of the Bank of England and which after payment of the broker's commission

and other incidental expences of sale produced the sum of *l.* which the said James Smith hath paid into the hands of the said Thomas Brown and the re-transfer of which said 3000*l.* 3 *per cent.* Reduced Bank Annuities with payment in the mean time of such a sum or sums of money as will be equivalent to the dividends which would have been payable in respect of the same in case such transfer had not been so made as aforesaid hath been in part secured to the said James Smith his executors administrators and assigns by certain indentures of lease and release and mortgage bearing date respectively the day next before and even date with these presents Now the condition of the above-written bond or obligation is that if the said Thomas Brown his heirs executors or administrators do and shall on the day of which will be in the year 1822 or in case the books of the Governor and Company of the Bank of England for the transfer of 3 *per cent.* Reduced Bank Annuities shall be then closed then do and shall on the first day after the said day of on which such books shall be open for making transfer of such stock well and truly transfer or cause to be transferred 3000*l.* 3 *per cent.* Reduced Bank Annuities in the said books of the said Governor and Company into the name or names of the said James Smith his executors administrators or assigns and do and shall in the mean time and from time to time well and truly pay or cause to be paid unto the said James Smith his executors administrators or assigns such a sum or sums of money as shall be equivalent to the dividends which would have become payable unto him or them in respect of the said first-mentioned 3000*l.* 3 *per cent.* Reduced Bank Annuities in case the same had not been so transferred as aforesaid on or at the like days or times and in the like shares and proportions on or at and in which such dividends would have become payable in case such transfer had not been so made as aforesaid without any

deduction or abatement whatsoever then and in such case the above-written bond or obligation shall be void or else shall remain and be in full force and virtue.

TABLE

OF

THE NAMES OF CASES.

A.

Page

ABBEY *and* Hancox...462. 473. 475
Abbot *and* Clarke 570
Abbott *and* Hobart..... 520
Abergavenny's Case..... 68
Abingdon (Lord) *and* Den... 64
——— *and* Clarke 456
Acton *v.* Pierce 539
Adams *v.* Gould..... 526
——— *v.* Claxton 409
——— *v.* Meyrick 465
Adderley *and* Gresley 352. 372. 597
Aggas *v.* Pickerell..... 543
Aldrich *v.* Cooper 254. 506, 507
Aldridge *v.* Lord Walls-court 461. 474
Allan *v.* Backhouse..... 167, 168
Allen *v.* Anthony 379
—— *v.* Papworth 559
Allnutt *and* Rex..... 96
Amis *v.* Lloyd 338
Amesbury *v.* Brown..... 447
Amhurst *v.* Dawling 59
Ancaster (Duke of) *v.* Mayer 459. 464. 479. 492. 499, 500

Page

Anderson and another *and* Holbird 65
Anderson *and* Price 297
——— *ex parte* 361
——— *and* Camden..... 280
Anderton *v.* Cook 465
Andrew *v.* Wrigley 177. 180. 183, 184. 374
——— *and* Attorney-General 67. 95
Andrew Newport's Case ... 377
Andrews *v.* Emmott 461
Angel *v.* Draper..... 539
—— *v.* Smith 596
Annandale, Marchioness of, *ex parte* 363
Anonymous (2 Madd.) ... 206
——— (1 Salk.) 321
——— (1 Vern.)..... 355
——— (Com.)..... 362
——— (2 Freem.) ... 378
——— (3 Salk.) 395
——— (2 Ves.) 396
——— (2 Vern.)..... 398
——— (2 Ves. 3 Salk.) 399
——— (2 Ves.) 422
——— (2 Ventris) ... 463

Page

Anonymous (Barnard.) ... 515
——— (2 Ch. Ca.) ... 518
——— (Barnard.) ... 528
——— (3 Atk.) 538
——— (2 Atk.) 543
——— (*ibid.*) 544
——— (1 Salk.) 562
——— (2 Ventris) ... 564
——— (6 Ves.) 596
Anthony *and* Allen 379
Applebee *and* Edwards..... 217
Arbuckle *v.* Cowtan 236
Arcedechne *v.* Bowes 551
Archdeacon *v.* Bowes 596
Archer *v.* Snatt..... 397
Ares *v.* Hardress..... 75
Arnold *and* Regina..... 102
Ascough *v.* Johnson 321
Ascue *and* Hollingworth...79. 81
Ashburnham *v.* St. John ... 68
Ashdown *and* Stileman 73
Ashenhurst *v.* James ... 319. 444
Ashley *and* Harvey 382
Ashton *and* Trafford..... 169
——— *and* Goodier 512
Ashwick *and* Watkins 453
Askam *and* Berry 168
Astley *v.* Tankerville 503
Aston *and* Woolston 36
Atkins *v.* Uton 40
Atkinson *v.* Mayling..... 263
Athol (Duke of) *and* Lanvy..... 502. 506
Atkyns *and* East India Company 22
——— *and* Vaughan..... 115
Attorney-General *and* Pawlett 42. 44

Page

Attorney-General *and* Scott 51
——— *v.* Buller 579. 582
——— *v.* Andrew 67. 95
——— *v.* Bowyer ...570. 588
——— *v.* Hanbury 109
——— *v.* Capel.....*ibid.*
——— *v.* Backhouse 379
——— *v.* Meyrick 566. 568. 591
——— *and* Munday 568
——— *v.* Brewers' Company 443
——— *v.* Lockley and others 50
——— *v.* Day 232
——— *and* Neale ...443. 445
——— *v.* Vigor 570
——— *v.* Barkham 465
——— *v.* Crofts 539
——— *v.* Tyndall 506
Austen *v.* Executors of Dodwell..... 453, 533
——— *v.* Halsey 258
Austin *and* Tate 503
Aynsley *v.* Reed 541

B.

Backhouse *and* Allan... 167, 168
——— *v.* Middleton..... 168
——— *and* Bedford 383
——— *and* Attorney-General 379
Bacon *v.* Bacon 44
——— *v.* Peck..... 74
Baddall *and* Gibbons..... 249

Page

Baddam *v.* Odell..... 443. 559
Badger, *ex parte*..... 505
Bagot *v.* Oughton ... 499. 503, 504
Bailey *v.* Ekins 189. 192
Bailly *and* Goodtitle 535
Baines *v.* Dixon 188
Baker *v.* Wind 107
—— *v.* Harris 394
—— *v.* Kellett 321. 562
—— *and* Thornbrough ... 530
—— *and* Horn..... 266. 268
Baldwin *and* Blayer 75
Bale *and* Manlove 127. 319. 354
Ball *v.* Ball..... 483
—— *and* Caldwell..... 274
Ballett *v.* Sprainger 552
Bamfield *v.* Windham 461. 465
——— *and* Knight 559
Bamford *v.* Baron 263
Bance *and* Heams 396. 398, 399
Banes *and* Freeman..... 356
Bank *and* Mills 173
Banks *and* Witherington 354. 371
—— *v.* Sutton 49
Barber *and* Doe..... 236
Barker *and* Davy 355
—— *and* Perry 516
——— *and* Corbett... 542, 543. 547. 551
Barkham *and* Attorney-General 465
——— *and* Brown 438, 439. 449
Barnard *v.* Young 304
Barnard *and* Langford 20
Barnardiston *and* Carter ... 506

Page

Barnes *and* Blacklock..... 557
Barnsley *and* Cox 67
Barnett *v.* Weston..... 414. 428
Barnewall *v.* Lord Cawdor 487
Baron *and* Bamford 263
—— *and* French 353. 557
Barrell *and* Sabine 39
Barron *v.* Martin 544
Barrow *v.* Gray 84
——— *and* Packington..... 536
Bartholomew *and* Powell..... 16
——— *v.* May ...483. 485
Barthrop *v.* West..... 540
Barton *and* Roscarrick ...41. 522
——— *v.* Barton 463
Barwell *v.* Parker 189
Basset *v.* Perceval 497. 501
——— *and* Sacket 440
Basspool *v.* Long 112
Bastard *v.* Clark 338
Bate *and* Kenworthy..... 187
Bateman *v.* Bateman..... 485
Bates *v.* Dandy 534
Bath and Wells (Bishop of) *and* Phipps..... 596
Bath (Earl of) *v.* Earl of Bradford..... 187. 189. 192
—— (Marquis of) *and* Montgomerie..... 520
Batson, *ex parte* 263
Batteson *and* Clyatt 552
Baxter *v.* Manning..... 395
Bayly *v.* Robson..... 399
Bayne *and* Trimmer ... 258. 506
Baynard *and* Gundry 524
Bayntun *and* Perkins ... 497. 500
Beavor *and* Bishop of Winchester..... 523, 524, 525

Page
Beck *v.* Welsh 216
Becket *v.* Cordley 389. 427
Beckford *and* others *v.* Wade 542
——— *and* Campbell ... 544
——— *and* Quarrell 556. 561. 596
Bedford *v.* Backhouse 383
Beecher *and* Scott 458. 491. 497, 498
Belch *and* Harvey 542
Belcher *and* Thunder 328
——— *and* Green 168
Belchier *v.* Butler 419
——— *v.* Renforth 421
Bellew (Lord) *and* Kelly 443
Bell *and* Walker 597
Belvidere (Earl of) *v.* Rochfort 493. 498
Bence *and* Brothers 429
Bendlowes *and* Wainwright 465, 466
Bennett *v.* Edwards 443, 524
——— *v.* Lee 524, 525
——— *ex parte* 505
Benson *v.* Scott 112. 115
Bentham *v.* Haincourt 558
Berkeley *and* Brome ...145. 151
Berney *v.* Sewell 596
Berresford *v.* Hobson 534
Berrisford *v.* Milward 427
Berry *v.* Askham 168
——- *and* Mayor of Norwich 70
Best *and* Brent 533
Bethell *and* Vernon 547
Bevis *v.* Cocker 515, 516
Beverley *and* Lawrence 530
Beversham *and* Davie..... 114

Page
Bickersdike *and* Hill 390
Bickham *v.* Cross 442
Bickley *v.* Dorrington 537
Bicknell *and* Evans 428
Biddulph *v.* St. John 387
Biggs *and* Lingham 268
Bill *and* Humble 178
Billinghurst *v.* Walker 501
Binkes *and* Troughton 537
Birch *v.* Wright..... 326. 343
Birch's Case 517
Bird *and* Lomax 537
Birkhead *and* Wortley 239. 390. 410. 421
Birley *and* Gladstone 313
Bishop *v.* Church 450
Bithazey *and* Dashwood 512. 514
Blackburn *v.* Gregson..... 248
Blackburne *and* Chinnery 122. 296
Blacklock *v.* Barnes 557
Blackman *and* Powseley ... 328
Blades *v.* Blades 387
Blake *and* D'Arcey 51
—— *v.* Marnell 187
Blake and others *and* Sharpnell 397. 399. 450. 452
Blakelock *and* Stevenson ... 312
Blamire *v.* Mayor of Carlisle and others 124
Blayer *and* Baldwin 75
Blithway *and* Dashwood ... 516
Blundell *and* Bootle ... 459, 460, 461. 464. 476
Bodington *and* Wilkes 388. 424
Bonafous *v.* Rybot..... 448
Bond *v.* Kent 249, 250
Bonham *v.* Newcome..... 517

Page
Bonham *and* Newcomb 21, 22. 35
Bonithon *v.* Hockmore..... 353
Bonney *v.* Ridgard..... 180. 183
Booth *v.* Rich.....512. 524. 526
—— *v.* Booth 518
—— *and* Whale..... 181, 182
—— *and* Walmesley 448
Bootle *v.* Blundell 459, 460, 461. 464. 476
Borlace *and* Draper 427
Bosanquet *and* Williams ... 126. 296
——— *ex parte*... 361
Bosvil *v.* Brander..... 534
Bothomly *v.* Fairfax..... 83
Botelers *and* Hearn 249
Bourn *v.* Dodson 268
Bowen *v.* Edwards 27
Bower *and* Largan..... 598
Bowers *and* Perry 102
——— *and* Fearon 272
Bowes *ex parte* 362. 572
—— *and* Arcedechne 551
—— *and* Archdeacon 596
Bowman *and* Holliday 466
Bowsher *and* Davis 311
Bowyer and another *and* Clerkson 520. 531
——— *and* Attorney-General 570. 588
Boxwell *and* Copleston..... 33. 39
Boycot *v.* Cotton 186
Boyes *and* Spencer 525
Brace *v.* Duchess of Marlborough 239. 240. 246. 417. 429
Braddyl *and* Talbot..... 34. 207
Bradford (Earl of) *and* Earl of Bath..... 187. 189. 192
Page
Bradley *and* Garforth..... 452
——— *and* Bulstrode..... 555
Bradshaw *v.* Outram..... 521
Braidnox *v.* Gratwich 465
Brander *and* Bosvil..... 534
Brander and another, *and* Young and another 297
Brandlyn *and* Comyn..... 73
Brassey *v.* Dawson..... 102
Brathwaite *v.* Brathwaite... 321. 564
Braybroke Lord, *v.* Inskip 581
Breerton *v.* Jones 422
Brent *v.* Best 533
Brend *v.* Brend 547
Brest *and* Scott 367
Brettell, *ex parte* 580
Brewer *and* Rakestraw 127. 527. 545
Brewers' Company *and* Attorney-General 443
Brewster and others *v.* Clarke and others 286
Brickwood *and* Watson 459. 461. 472
Bridgman *v.* Dove 461
Brightens, *ex parte*..... 206
Briscoe *v.* King 598
Bristol *v.* Hungerford ...420. 424
Bristow (Bishop of) *v.* Cox-head 101
——— (Bishop of) Case 66
Brizick *v.* Manners 200
Broadway *and* Morecroft ... 438
Brome *v.* Berkeley..... 145. 151
Bromhall *v.* Wilbraham..... 463
Bromley *v.* Holland 321. 563, 564

Page

Bromley *v.* Goodere 456
——— *and* King 36
Brooker *and* Hall 463
Brooks *v.* Greathed 596
Brothers *v.* Bence 429
Brotherton *v.* Hatt..... 380
Brown *v.* Rose 236
—— *and* Goodrick 48
—— *v.* Heathcote 263. 275
—— *and* Amesbury 447
—— *v.* Barkham 438, 439. 449
—— *and* Keeling 469
—— *and* Fell..... 521. 540. 553
Browning *and* Hovell 388
Brummel *v.* Protheroe 460. 468
Bryan *v.* Cormick 596
Brydges *v.* Phillips..... 467. 470
Bryson *v.* Wylie..... 268
Buckingham (Duke of) *v.* Sir R. Gayer 559
Bucknel *v.* Royston ... 264. 268
Buller *and* Attorney-General 579. 582
Bulstrode *v.* Bradley 555
Burdon *v.* Kennedy 52. 70
Burgaine *v.* Spurling 113. 116
Burgess *v.* Wheate...60, 61. 248
——— *and* Manners..... 452
Burgh *v.* Langton..... 516
—— *v.* Francis 229. 279
Burghall (Assignees of) *v.* Howard 272
Burlington, Lady, *and* Carr 189
Burting *v.* Stonard..... 177, 178
Burnell *v.* Martin 352. 518
——— *and* Walker 268
Burton *v.* Slattery..... 449
——— *v.* Knowlton ... 467. 474

Page

Bury *v.* Bury 381
Burwell *v.* Harwell,..... 65
Bush *and* Sadler 430
Bushell *v.* Bushell 385. 387
Butcher *v.* Stapely 378
Butler *v.* Duncombe ... 144. 149. 174
—— *v.* Butler.....492. 500
—— *and* Belchier 419

C.

Cadell *and* Mace 266
Cadogan *v.* Kennett ... 264. 268
Caine *and* Fountain ... 525, 526
Caldwell *v.* Ball 274
Camden *v.* Anderson..... 280
Campbell *and* Wright 270. 274
——— *v.* Beckford 544
Campbell's Case 66
Canning *v.* Hicks 530, 531
Capadose *v.* Codnor..... 286
Capel *and* Attorney-General 102
Carlisle (Earl of) *and* Globe and wife..... 520
——— (Mayor of) and others *and* Blamire 124
Carlton *and* Lowther 374
Carpenter *and* Harford 197
——— *and* Sorrell..... 388
Carr *v.* Lady Burlington ... 189
Carter *ex parte* 408
—— *v.* Barnardiston..... 506
—— *and* Hall 156. 162. 169. 186
—— *and* Doe..... 65
Cartwright *and* Hebblethwaite 145. 155. 169
——— *and* Rand 540

Page
Casborn *and* Challis ...397, 398
Casborne *v.* Scarfe 42. 48. 60. 572. 588
Cason *v.* Round 429
Catherington (Inhabitants of) *and* Rex 331. 354
Cator *v.* Charlton 403
Caverley Lady, *and* Leving 524
Cawdor *and* Barnewall 487
Cecil's Case 95
Challis *v.* Casborn..... 397, 398
Chadwell *and* Godfrey 523
Chambers *v.* Goldwin 318. 353. 366. 438. 559. 561
Chancellor of Oxford's Case 101
Chandler *and* Tooms..... 598
Chandos *and* Lyon 158
Chapman *v.* Emery 355
——— *and* Howse 188
——— *v.* Tanner 248. 558
Chaplin *v.* Chaplin..... 447
Charlton *and* Lechmere..... 501
——— *and* Cator 403
Charnock *and* Moss 282
Cheney (Lord) *and* Pierpoint 164
——— *and* Hunsdon..... 427
Cherry *and* Ferrars 374
Chesterfield *v.* Cromwell ... 443
Chichester *and* French 461. 463
Child *and* Harewood 466
Chinnery *v.* Blackburne 122. 296
Chitters *and* Hartwell..... 58
Chitty *and* Williams 469
Cholmley *v.* Lord Oxford ... 515
Cholmondeley *v.* Clinton ... 330. 342
Church *and* Bishop..... 450
——— *and* Lonsdale..... 456
Page
Churchill *v.* Grove and others 410. 451
Churchman *v.* Harvey 158
Clapham *and* Holdfast 116
Claridge *and* Hollis 310
Clark *and* Bastard..... 338
Clarke *and* Machell 219
—— and others *and* Brewster and others 288
—— *v.* Abbot 570
—— *and* Wride..... 488
—— *v.* Seton..... 456
—— *v.* Lord Abingdon *ib.*
Clarkson *and* Wilde *ib.*
Claxton *and* Adams 409
Clay *v.* Sharpe 132
——*and* Hungerford..... 368
Claypool *and* Ismood 515, 516
Clench *v.* Witherby 26
Clerkson *v.* Bowyer and another 520. 531
Clinton *v.* Seymour 146. 158. 165
——— *v.* Hooper 503. 504
Clinton (Lord) *and* Polk ... 186. 553
——— *and* Cholmondeley...330. 342
Cloberry *v.* Lymonds..... 561
Clopton *and* Long 321. 563
Close *v.* Waterhouse 312
Clyatt *v.* Batteson 552
Cocker *v.* Bevis 515, 516
Codrington *v.* Parker..... 596
——— *v.* Lord Foley 146. 160, 161
Codnor *and* Capadose 286
Cogan *and* Huyt..... 67
Cole *v.* Davis 263

Page
Cole *and* Kerrison 287
—— *and* Taylor..... 66
Coleman v. Winch 397, 398, 399. 409
Coles *and* Hunt 71
—— *and* Forshall 69
Collett *v.* de Gols...388. 429, 430
—— *v.* Munden 404
Collier *and* Spurgeon..... 543
Collins *v.* Forbes..... 268
—— *and* Wetherell 392
Colville *and* Stapleton 461. 465
Colman *v.* Duke of St. Albans 332. 556
Combe, *ex parte* 204
Comerford *and* Lucas..... 125
Coming, *ex parte*..... 202
Complin *and* Goddard 356
Comyn *v.* Brandlyn 73
Conway *v.* Conway 160
—— *and* Stapleton..... 432
—— *v.* Shrimpton..... 545
Conyngham *v.* Conyngham 188
Cook *v.* Harris..... 119
—— *and* Anderton 465
—— *v.* Parsons 188. 526
—— *and* Cropping 558
Cooper *and* Aldrich 254. 506, 507
—— *v.* South 297
—— *v.* Langworth..... 74
—— *and* Newby..... 408
Cope *v.* Cope..... 457. 493. 497
Copeman *v.* Gallant 266
Coppin *v.* Coppin 248. 256. 259
Coppin *v.* Fernyhough 381
Copleston *v.* Boxwell..... 33. 39
Corbet *v.* Maidwell 137. 147. 170
—— *and* Powis... 398, 399. 487
Page
Corbet *and* Ewer.....177, 178
Corbett *v.* Barker 542, 543. 547. 551
Corder *v.* Morgan 134
Cordinglee *v.* England 355
Cordley *and* Becket ... 389. 427
Cormick *and* Bryan 596
Cornel *v.* Sykes 542
Cornish *v.* Mew 552
Costigan *v.* Hastler..... 345, 346
Cotterell *v.* Purchase ... 28. 106
Cotton *v.* Iles 530
—— *and* King..... 97
—— *and* Boycott 186
—— *v.* Cotton 547
Courtown, Lord, *and* Underwood..... 386
Coventry *v.* Coventry..... 502
——— *and* Tweedale 485
Cowell *v.* Simpson..... 248. 314
Cowper *and* Procter 442. 544. 560
Cowtan *and* Arbuckle 236
Cox *and* Jory 59. 448
— (Sir Charles) Creditors 58, 59
— *and* Sherman...522, 523. 559
— *v.* Barnsley 67
Coxeter *and* Cutler..... 463
Coxhead *and* Bishop of Bristow 101
Craggs *and* Digby 319. 439. 443
Craig *and* Kinloch..... 313
Crane *v.* Drake 183
—— *and* Fox 232
—— *and* Turner 532
Crawley *and* Lidgeat 74
Creed *and* Gubbins 365
Creuze *v.* Hunter 189, 190. 443

Page
Crips *v.* Grysil 567
Crisp *v.* Heath 523. 559
—— *and* Lant 517
Croft *v.* Powell 129
Crofts *and* Attorney-General 539
Crofton *v.* Ormsby..... 379
Cromwell *and* Chesterfield 443
Cropping *v.* Cooke..... 558
Cross *and* Bickham 442
Cruise and Sargeson 447
Cuff *and* Savignac 274
Cunliffe *and* Edwards... 510. 515
Curtis *v.* Perry 287
—— *and* Johnson 559
Cutler *v.* Coxeter 463

D.

Dale *and* Westerdell ... 123. 286. 296
Dalmer *v.* Dashwood 596
Danby *and* Elliott 102
Danby *and* Palmes 540, 541
Dandy *and* Bates 534
Daniel *v.* Skipwith..... 512. 521
Daniels *v.* Davison 378, 379
Dansey *and* Ravenhill..... 164
Darby *v.* Smith 268
—— *and* Noke..... 463
D'Arcey *v.* Blake..... 51
Darcy *v.* Hall 321, 322. 563. 565
Darlington *and* Wilson 502
Dashwood *v.* Blithway 516
——— *v.* Bithazey... 512. 514
——— *and* Dalmer 596
Daubigny *v.* Duval..... 269
Page
Daubuz and another *and* Pie 219
Davie *v.* Beversham 114
Davies *v.* Topp 487
—— *and* Titley 403
Davis *v.* Dendy 353
—— *v.* May..... 556
—— *v.* Earl of Strathmore 69. 388. 431
—— *v.* Gardner..... 483
—— *v.* Bowsher 311
—— *v.* Gibbs 570
—— *and* Cole 263
Davison *and* Daniels ... 378, 379
——— *and* Robinson 420
Davy *v.* Barker 355
Dawling *and* Amhurst 59
Dawson *and* Brassey 102
Day, *ex parte* 505
—— *and* Williams..... 559
—— *and* Attorney-General 232
Dayrell *and* Rorke 96
De Bouchout *v.* Goldsmid... 269
Deeble *and* Needler 559
Deeze, *ex parte* 311
De Gols *and* Collett 388. 429, 430
Dehew *and* Saunders 517
Delight *and* Wakerell ...340. 515
Delamotte *and* Rex 61
Demainbray *v.* Metcalf..... 408
Den *v.* Lord Abingdon 64
Dendy *and* Davis..... 353
Denn *and* Ireson 405
Denison *and* King 469
Deniston *and* Lord Forbes... 387
Derby *and* Hanson..... 371
—— (Earl of) *and* Lingard 188

Page
Derby (Earl of) *and* Earl Rivers 169. 175, 176
Dethick *and* Stephens...145. 157
Detillin *v.* Gale ... 355. 393. 560
Devonshire *and* Foxcroft ... 429
Dewar *v.* Sparr 434
Dickens *and* Morecock 384
Dickenson *v.* Smith..... 597
Digby *v.* Craggs... 319. 439. 443
Dilliston *and* King 112
Dixall *and* Roberts..... 187
Dixon *v.* Parker..... 25
—— *v.* Saville 48
—— *v.* Ewart 285
—— *v.* Smith.....597
—— *and* Baines..... .. 188
Dodd *and* Hine 387
Dodson *and* Bourn..... 268
Dodwell (Executors of) *and* Austen.....453. 533
Doe *v.* Carter 65
— *v.* Wharton 66
— *v.* Mitchell..... 102
— *v.* Tofield 114. 116
— *v.* Wroot..... 112
— *v.* Vernon 114
— *v.* Wichelo..... 214
— *v.* Mears..... 235
— *v.* Barber..... 236
— *v.* Lufkin 379
Dolben *and* Stuckville 517
Dolland *and* Lyster..... 52. 55
Dolman *v.* Smith 461. 464. 466
Donisthorpe *v.* Porter..... 500
Donne *v.* Lewis 487, 488
Dorington *and* Bickley..... 537
Doulben *and* Hughes..... 189
Dove *and* Bridgman..... 461
Downes, *ex parte*..... 505
Downman *v.* Matthews..... 312
Drake *and* Crane 183
Draper *v.* Borlace 427
——— *and* Angel..... 539
Draper *v.* Jenning 522
Drew *v.* Power 559
Drummond *and* M'Leod ... 177. 180, 181, 182. 184
Drury *v.* Man 103
Duck *and* Widdowson 192
Dunch *and* Hall 46
Duncombe *v.* Hansley 521
——— *and* Butler 144. 149. 174
Dunsany *and* Latouche 386. 429
Duval *and* Daubigny..... 269

E.

Earl *and* Senhouse..... 511. 528
East India Company *v.* Atkyns 22
——— *and* Gordon 268
Eaton *v.* Jaques... 118. 295, 296
Ebor. (Dux) *and* Welden... 370
Eccles *v.* Thawill 398
Echlin *and* Tasburgh 31
Edington (Inhabitants of) *and* Rex 134
Edmunds *v.* Povey..... 413. 430
Edwards *v.* Applebee..... 217
——— *v.* Harben 265
——— *v.* Warwick..... 453
——— *v.* Freeman 502
——— *v.* Cunliffe 510. 515

Page
Edwards *and* Bennett ...443. 524
——— *and* Bowen 27
——— *and* Elliott..... 249
Effingham *v.* Napier 499
——— *and* ——— ... 525, 526
Egerton *and* Tilley..... 529
——— *and* Head..... 196
Ekins *and* Bailey 189. 192
Elliott *v.* Edwards 249
——— *v.* Danby..... . 102
——— *v.* Merryman..... 180
——— *and* Shephard 556
Ellis *v.* Hunt..... 275
——— *and* Pettat 454
——— *v.* Ganvas 531
——— *and* Noy..... 530
Elways *and* Morly 546
Elwes *and* Forrest 304
Ely, Bishop of, *and* Tooke... 517
Emanuel College v. Evans... 20
Emery *and* Chapman..... 355
——— *and* Porter 356
Emmot *and* Andrews..... 461
Endsworth *v.* Griffiths..... 28
England *and* Cordinglee 355
Equity (Maxims in)..... 530
Errington *v.* Howard..... 236
Evans *and* Emanuel College 20
——— *and* Stone..... 123
——— *and* Smith..... 159
——— *v.* Martlett..... 270
——— *v.* Bicknell..... 428
——— *and* Thornhill.....438. 442
Evelyn *v.* Evelyn 169. 172. 176. 186. 497. 499. 501
——— *v.* Forster 361
Evers *and* Garrett 531. 590
Ewart *and* Dixon..... 285

Page
Ewer *v.* Corbet 177, 178
——— *and* Lockwood and others 309
——— *and* White.....33. 542
Exton *v.* Greaves 33
Eyre *and* Jason 21, 22. 36

F.

Fairfax *v.* Montague..... 544
——— *and* Bothomley..... 83
Farmer *and* Green..... 312
Farquhar *and* M'Queen 374. 383
Farr *v.* Newman..... 182
Farrant *v.* Lovell 342
Fastnedge *and* Price 398
Fauconberg *and* Fitzgerald 59
Fawell *v.* Heelis 249
Fawcett *v.* Lowther 60. 114. 117
——— *v.* Fothergill..... 539
——— *and* Tankerville 500
Fearon *v.* Bowers 272
Featherstone *v.* Fenwick..... 197
Featherstonhaugh *and* Mitford..... 438
Fell *v.* Brown.....521. 540. 553
Fenelito *ex parte* 361
Fenwick *v.* Reed..... 209
——— *and* Featherstone... 197
——— *and* Langstaffe 353. 560
Fereyes *v.* Robinson 459. 461
Fermor's Case 348. 356
Fern *and* Franklyn 26. 537. 539
Fernyhough *and* Coppin..... 381
Ferrars *v.* Cherry..... 374
Ferrers *and* Shirley..... 189
Fielding *and* Wilson 58. 509
Finch *v.* (Earl of) Winchelsea 71

Page
Fineux *and* Willis..... 371
Finden *and* Shallcross..... 469
Fisher, *ex parte*.....505, 506
Fishwick *v.* Lowe..... 522
Fitton *and* (Earl of) Macclesfield 315. 319. 444
Fitzgerald *v.* Fauconberg.... 59
Fleetwood's Case..... 73
Fluit *and* Plumb..... 428
Floyd *v.* Mansel..... 543
Floyer *v.* Lavington 29
Flyn *v.* Matthews 263
Focus *v.* Salisbury 356
Foley (Lord) *and* Codrington 146. 160, 161
——— *and* Lingon..... 168
Forbes (Lord) *v.* Deniston... 387
——— *and* Collins..... 268
Forester *v.* Leigh 492
Forrest *v.* Elwes 304
Forshall *v.* Coles..... 69
Forster *and* Evelyn 361
——— *and* Fulthorpe 207
Forth *and* Harrison 374
Fortrey *v.* Fortrey 57, 58
Fotherley *and* Tredway..... 112
Fothergill *and* Fawcett..... 539
Fountain *v.* Caine.....525, 526
Fowler *v.* Wightwick..... 556
Fownes *and* Hunt 392
Fox *v.* Crane..... 282
Foxcroft *v.* Devonshire 429
Francis *and* Burgh 223. 279
Franklyn *v.* Fern....26. 537. 539
Frazer *v.* Hopkins and another 297
Freake *v.* Hearsay 519
Freke *and* Lewis 186
Freeland *and* Sayle..... 525
Freeman *v.* Banes 356
——— *and* Edwards..... 502
——— *and* Pasley..... 427
——— *and* Parsons 493
French *v.* Baron.....353. 557
——— *v.* Chichester ...461. 463
——— *and* Lord Inchiquin 461. 465
Frosell *v.* Welsh..... 114
Fry *v.* Porter..... 378
Futhorpe *v.* Forster 207
Fulwood's Case 65. 74

G.

Gale *and* Detillin...355. 393. 560
Gallant *and* Copeman 266
Galley *v.* Selby..... 59
Gallimore *and* Moss 329. 334
Galton *v.* Hancock 457. 485. 488. 509
——— *and* Mallack 524, 525. 527
Gardner *and* Kelvington..... 22
——— *and* Lucy..... 502
——— *and* Davis..... 483
Gardiner *v.* Griffith 59. 233. 371
Garforth *and* Bradley 452
Garret *v.* Evers 531. 590
Garth *v.* Ward 388. 515. 523
Gnavas *and* Ellis..... 531
Gayer, Sir R. *and* Duke of Buckingham..... 559
Gee *and* Robinson..... 563
Geery *and* Kilmurry 186
Gerrard *v.* Gerrard.....141. 169

Page
Gibbons *v.* Baddall..... 249
——— *and* Jones 266, 267, 268
Gibbs *and* Davis..... 570
Gibson *v.* Rogers 168
Gifford *and* Nugent 177. 180. 182
Gilbert *and* Ivy...168, 169, 170. 176. 369
Gill *and* Haslington..... 264
Gillam, *ex parte*..... 363
Gilleapie *and* Mestaer 222. 284. 288. 295. 298
Girling *v* Lee..... 58
Gladstone *v* Birley..... 313
Gladwin *v.* Hitchman..... 518
Glasscock *v.* Morgan..... 74
——— *and* Tooke..... 213
Globe and Wife *v.* Earl of Carlisle..... 520
Glover *and* Powell..... 565
Goddard *v.* Complin 356
Godfrey *v.* Watson 66. 127. 319. 353, 354. 392
——— *v.* Chadwell..... 523
Goldsmid *and* De Bouchout 269
Goldwin *and* Chambers 318. 353. 366. 438. 559. 561
Gomme *v.* West..... 597
Goodal *v.* Rivers 153. 169
Goodall's Case 16. 20
Goodere *and* Bromley..... 456
Goodier *v.* Ashton 512
Goodrick *v.* Brown..... 48
Goodtitle *v.* Pope 338
——— *v.* Morgan 428
——— *v.* Bailey..... 535
Goodyere *v.* Ince 74, 75
Gordon *v.* the East India Company..... 268
Page
Gordon *v.* Graham..... 429
——— *and* Williamson 524, 525
Gore *v.* Stockpole 516
Gould *and* Adams..... 526
——— *v.* Tancred 556
Gower *and* Solly 56, 57
Graham *and* Gordon 429
Grant *v.* Mills..... 249
——— *and* Thompson...531. 588
Gratwich *and* Braidnox..... 465
Gray *and* Barrow..... 84
——— *v.* Minnethorpe...463. 466
Greathed *and* Brooks..... 596
Greaves *v.* Mattison 139. 169
——— *and* Exton..... 33
Green *v.* Belcher 168
——— *v.* Farmer..... 312
Gregory *v.* Molesworth..... 526
Gregson *and* Blackburn..... 248
Grenvill *and* Seymour 75
Grenville *and* Earl of Huntingdon 416. 431
Gresley *v.* Adderley...352. 372. 597
Grey *v.* Grey 463
Griffith *and* Gardiner ...59. 233. 371
——— *and* Owen..... 66
Griffiths *and* Bodsworth..... 28
Grimstone, *ex parte*..... 541
Grove *ex parte*..... 505
——— and others *and* Churchill 410. 431
Grover *and* Tabor 531
Grysil *and* Crips..... 567
Gubbins *v.* Creed 365
Gundry *v.* Baynard..... 524
Gwin *and* Turner 48

Page
Gwynne, *ex parte*.....259. 314
Gyles *v.* Hall.....450. 452

H.

Hacket and Bedel *v.* Wakefield 411
——— *and* Lloyd..... 456
Hadfield *and* Rushforth 312
Haigh, *ex parte*..... 198
Haincourt *and* Bentham 558
Hales *and* James 552
Halifax (Marquis of) *and* Higgins 448
Hall *v.* Dunch 46
——— *v.* Carter 156. 162. 169. 186
——— *v.* Smith.....378, 379
——— *and* Darcy...321, 322. 563. 565
——— *and* Keech...328. 343. 347. 351. 540
——— *v.* Brooker 463
——— *and* Gyles 450. 452
Halliley *v.* Kirtland.....395. 409
Halsey *and* Austen 258
Hambly *and* Yates 208. 522. 546
Hamill *and* Trimleston 561
Hamilton *v.* Royce..... 381
——— *v.* Worley.... 500, 501
——— *v.* Lloyd..... 591
Hamlyn *v.* Lee 594
Hampton *v.* Spencer 26. 36
Hanbury *and* Attorney-General..... 102
Hancock *and* Galton....457. 485. 488. 509
——— *and* ———358. 361
Hancox *v.* Abbey 462. 473. 475
Handcock *and* ——— 358. 361
Hanman *v.* Woodford 84
Hannam *v.* Morgan 112
Hansard *v.* Hardy..... 515. 544
Hansley *and* Duncombe..... 521
Hanson *v.* Derby 371
Harben *and* Edwards..... 265
Harbert's Case 85
Hardingham *v.* Nichols..... 390
Hardress *and* Ares..... 75
Hardwick *and* Mattheson 501
Hardy *v.* Reeves...354. 392. 543, 544
——— *and* Hansard 515. 544
Hare *and* Ruscombe 547, 548
Harewood *v.* Child 466
Harford *v.* Carpenter..... 197
Harman *and* Wilson 453
Harris *v.* Harris..... 443
——— *and* Cook..... 119
——— *and* Howard...21. 23. 33. 441. 540
——— *and* Baker 394
Harrison *v.* Southcote 248
——— *v.* Hart..... 309
——— *v.* Forth..... 374
Hart *and* Harrison..... 309
Hartpoole *v* Walsh 207, 208
Hartwell *v.* Chitters 58
Hartley *v.* Hurle..... 469
——— *and* Tooke 516
Harvey *v.* Ashley 382
——— *and* Belch..... 542
——— *and* Churchman..... 158
——— *and* Tebbutt..... 516
Harwell *and* Burwell 65
Hasel *and* Lowthian 396, 397. 399
Haslewood *v.* Pope.....461. 466

Page
Haslington *v.* Gill 264
Hastler *and* Costigan....345, 346
Hatchett *and* Lloyd 456
Hatt *and* Brotherton 380
Hatton *and* Holland..... 329
Hawkins *and* Taylor 185
——— *v.* Taylor..... 419
Hayes *v.* Hayes.....445. 552
Haylin *and* Taylor..... 559
Hayward *v.* Stillingfleet..... 232
——— *and* Stephenson... 422
Head *v.* Egerton 196
Healey *and* Hodle..... 543
Heams *v.* Bance ...396. 398, 399
Hearn *v.* Botelers..... 249
Hearsay *and* Freake..... 519
Heath *v.* Hubbard..... 288
——— *and* Crisp.....523. 559
——— *v.* Heath..... 465
Heathcote *and* Stephenson 464, 465. 476
——— *and* Brown...263. 275
Heather *and* Wilson 292. 295
Hebblethwaite *v.* Cartwright 145. 155. 169
Heelis *and* Fawell..... 249
Heir of Cannon *v.* Pack 393. 423
Hele *and* Phillips.....46. 538
Hellier or Heyter *v.* Jones 137, 138
Heming *and* Orde.....208. 546
Hendon (Lord of the Manor of) *and* Rex 115
Henningham *v.* Henningham 506
Herbert's Case..... 388
Herbert, *ex parte*.....388. 429
Hereford *and* Tracey..... 446
Hewitt *v.* M'Cartney..... 338
Page
Hewson *and* Huson.....339. 555
Heycock *v.* Heycock..... 168
Heydon's Case..... 64
Heyter *v.* Jones 137, 138
Hibbard *and* Smith..... 248
Hibbert and others *and* Rolleston and others ...278. 295
——— and others *v.* Rolleston and others..... 279
Hicks *and* Canning 530, 531
——— *and* Roe..... 116
Hide *and* Lomax 355. 522. 561
——— *v.* Mead..... 463
Hiern *v.* Mill 202, 203. 378, 379
Higgins *and* Marquess of Halifax 448
——— *v.* The York Buildings Company..... 72
Hill *v.* Price 519
——— *v.* Bickersdike..... 390
——— *v.* Simpson..... 183
Hine *v.* Dodd 387
Hinton *v.* Hinton 232
Hitchcock *v.* Sedgwick 388. 430
Hitchman *and* Gladwin..... 518
Hobart *v.* Abbott 520
Hobbs *v.* Norton 427
Hobson *and* Beresford 534
Hockmore *and* Bonithon 353
Hodges *v.* Templar..... 49
Hodle *v.* Healey.... 543
Holbird *v.* Anderson and another..... 65
Holdfast *v.* Clapham..... 116
Holland *v.* Hatton..... 329
——— *and* Bromley...321. 563, 564

Page
Holliday *v.* Bowman..... 466
Hollingworth *v.* Ascue 79. 81
Holles (Lady) *v.* Wyse 448
Hollis *v.* Claridge 310
Holt *v.* Holt 127
—— *v.* Mill.....413, 431
Hooper *and* Clinton.....503, 504
——— *ex-parte*...197, 198. 200, 201. 408
Hooper *and* Lawley 207
Hopkins and another *and* Frazer..... 297
Horn *v.* Baker 266. 268
Houghton, *ex parte*.....287, 288
Hovell *v.* Browning 388
How *and* Nicholls..... 101
—— *v.* Vigures....512. 521. 570
Howard *v.* Harris...21. 23. 33. 441. 540
——— *and* Errington..... 236
——— *and* Assignees of Burghall..... 272
Howell *v.* Price...207. 317. 457. 485. 517. 546
——— *and* Meux, *qui tam*.. 261
Howes *v.* Wodhave..... 521
Howse *v.* Chapman 188
Hubbard *and* Heath 288
——— *v.* Johnstone 284
——— *and* Porter 319. 444
Hudson *and* Lawson..... 500
——— *and* Wrighton... ... 383
Hughes *v.* Doulben 189
——— *v.* Kearney 249
——— *and* Lord Penrhyn 368. 445
——— *v.* Williams.....557. 561
Hull *v.* Sharbrook 113
Page
Humble *v.* Bill 178
Hunsden *v.* Cheyney 427
Hungerford *v.* Clay 366
——— *v.* Hungerford.. 445
——— *and* Bristol 420. 424
Hunt *v.* Coles 71
—— *v.* Fownes..... 392
—— *and* Ellis 275
—— *and* Smart..... 544
—— *and* Webber 556
—— *v.* Priest..... 597
Hunter *and* Creuze 189, 190. 443
Huntingdon, Earl of, *v.* Grenville..... 416. 431
Huntingdon *v.* Huntingdon 503. 547
Huntingford *and* Woods 495
Hurle *and* Hartley..... 469
Huson *v.* Hewson 339. 555
Hussey *and* White..... 355
Hutchinson *v.* Johnson 70
Huyt *v.* Cogan 67
Hyde *v.* Morley..... 85
——— *and* Sagittary..... 507

I.

Ibbotson *v.* Rhodes 427
Iles *and* Cotton..... 330
Inchiquin, Lord, *v.* French 461. 465
Ince *and* Goodyere 74, 75
Inhabitants of Catherington *and* Rex..... 331. 354
——— of St. Michael's *and* Rex..... 332
Innes *v.* Jackson.....59. 540. 550
Inskip *and* Lord Braybroke. 581

Page

Ireson *v.* Denn 405
Ironside *and* Renforth 419
Ismood *v.* Claypool.....515, 516
Ivie *and* Taner.....183
Ivy *v.* Gilbert 168, 169, 170. 176. 369

J.

Jackson *and* Innes. 59. 540. 550
——— *v.* Parker 548
——— *v.* Vernon.....122. 296
——— *and* Palmer 546
——— *and* Walker...461. 463. 465
Jacob *and* Rowntree 248
James *and* Ashenhurst...319. 444
——— *v.* Hales 552
Jaques *and* Eaton...118. 295, 296
Jason *v.* Eyre 21, 22. 36
Jeanes *v.* Wilkins 70
Jemmatt *and* Penner 428
Jenkins *v.* Keymis..... 187
Jenner *v.* Tracey..... 542
Jenning *and* Draper..... 522
Jennings *v.* Moore and others 230
——— *v.* Ward and others 26
——— *v.* Locke..... 447
——— *and* Windham 395. 398
Johnson *ex parte* 362
——— *v.* Curtis 559
——— *v.* Milksopp 457
——— *and* Ascough..... 321
——— *and* Shephend..... 303
——— *and* Hutchinson 70
Johnstone *and* Hubbard 284
Jolland *v.* Stainbridge 378

Page

Jones *v.* Gibbons 266, 267, 268
—— *ex parte*..... 295
—— *v.* Smith 397. 400. 403, 404. 406. 408
—— *v.* Meredith 541
—— *v.* Kenrick..... 516
—— *and* Breerton..... 422
—— *and* Hellier or Heyter 137, 138
—— *and* Webb 466
—— *and* Roe..... 47
Jolliffe *and* Mertins 374
Jory *v.* Cox 59. 448
Joulmin *v.* Steere..... 380
Joynes *v.* Statham..... 25

K.

Kearney *and* Hughes..... 249
Keech *v.* Hall...328. 343. 347. 351. 540
Keeling *v.* Brown 459
Kellett *and* Baker 321. 562
Kelly *v.* Lord Bellew 443
Kelvington *v.* Gardiner 22
Kemys *v.* Ruscomb 76
Kennedy *and* Burdon 52. 70
Kennett *and* Cadogan...264. 268
Kennebel *v.* Scrafton 112
Kenrick *and* Jones..... 516
Kensington, *ex parte* 196. 200. 203, 204. 266
Kent *and* Bond 249. 250
Kentish and Hawksley *and* Sanders..... 301
Kenworthy *v.* Bate..... 187

Page

Kerrison v. Cole 287
Keymis *and* Jenkins 187
Kilmurry *v.* Geery 186
King *v.* Bromley 36
—— *v.* Cotton 97
—— *v.* Dilliston 112
—— *v.* King..... 207
—— *ex parte* 401, 402
—— *v.* Dennison 469
—— *and* Briscoe..... 598
Kinloch *v.* Craig..... 313
Kinnoul *v.* Money 503
Kirby *v.* Potter..... 299
Kirk *and* Placknet 57
Kirkham *v.* Smith..... 48
Kirkman *and* Shawcross.... 311
Kirkland *and* Halliley...395. 409
Kite *v.* Queinton 113
Knight *v.* Maclean..... 456
——— *v.* Bamfield 559
Knollis *and* Palmer 74
Knott, *ex parte* 60. 253. 388. 421, 422. 424. 429, 430
Knowles *v.* Palmer 74
——— *v.* Spence 543. 556
Knowlton *and* Burton...467. 474
Kuffin *and* Roberts 559. 591
Kruger *and* Wilcox 312
Kynaston *v.* Kynaston 465

L.

Lacam *v.* Mertins 319. 354. 392. 503, 504
Lacon *v.* Mertins.....127. 248
Lake *v.* Thomas..... 544
Langford *v.* Barnard..... 20
Langley *v.* Earl of Oxford 177, 178

Page

Langley *and* Ramsden 392. 535
Langstaffe *v.* Fenwick...353. 560
Langston, *ex parte* 200. 201
Langton *and* Burgh..... 516
Langworth *and* Cooper 74
Lant *v.* Crisp 517
Lanoy *v.* Duke of Athol 502. 506
L'Apostre *v.* L'Plaisterer.... 266
Largan *v.* Bower 598
Lafouche *v.* Dunsany...386. 429
Lavington *and* Floyer 29
Lawley *v.* Hooper 207
Lawnd *and* Simonds 111
Lawrence *v.* Beverley..... 530
Lawson *v.* Hudson..... 500
Laycock *and* Shuttleworth...398. 401
Layton *and* Potts 56
Leake and another *and* Mouys 234
Lechmere *v.* Charlton 501
——— *and* Speldt....288. 298
Lee *v.* Vernon..... 127
— *and* Hamlyn..... 597
— *and* Girling 58
— *and* Marsh..... 411. 417
— *and* Bennett 524, 525
— *and* Pocock 503
Leeds, Duke of, *v.* Munday 575. 576. 583
Le Hook *and* Margrave..... 402
Lees *and* Mellor..... 29
Legat *v.* Sewell 48
Lehook *and* Margrave 407
Leigh *and* Forester..... 492
—— *and* Lutkins..... 457
Leman *v.* Newnham.....499, 500
Lempriere *v.* Pasley 270. 275

Page
Le Neve *v.* Le Neve 380. 387
——— *and* Norris 380
Lewin *v.* Okeley 58
Lewis *v.* Freke..... 186
——— *and* Donne 487, 488
——— *v.* Nangle...500. 503, 504. 538
Leving *v.* Lady Caverly..... 524
Lickbarrow *v.* Mason..... 272
Lidgeat *and* Crawley..... 74
Lifford's Case 344, 345
Lingard *v.* Earl Derby 188
Lingham *v.* Biggs..... 268
Lingon *v.* Foley 168
Littleton's (Sir Thomas) Case 530. 571
Littleton *v.* Wynn 530. 571
Litton *and* Robinson..... 342
Lloyd *and* Amis..... 338
——— *v.* Hatchett 456
——— *v.* Mansell 516
——— *and* Hamilton 591
——— *v.* Thursby 502
Locke *and* Jennings 447
Lockley and others *and* Attorney-General 50
Lockwood and others *v.* Ewer 309
Lomax *v.* Hide 355. 522. 561
——— *v.* Bird..... 537
Long *v.* Long..... 186
——— *v.* Clopton 321. 563
——— *and* Basspool..... 112
Lonsdale *v.* Church 456
Lowe *and* Fishwick 522
——— *and* Smith..... 378
——— *v.* Morgan 520
Lowther *v.* Carlton..... 374
Lowther *and* Fawcett 60. 114. 117
Lowthian *v.* Hasell 396, 397. 399
Lovell's Case 539
Lovell *and* Farrant..... 342
L'Plaisterer *and* L'Apostre 266
Lucas *v.* Comerford..... 125
——— *v.* Seale 512
Lucy *v.* Gardner 502
Lufkin *and* Doe 379
Lugg *and* Willie..... 407
Lutkins *v.* Leigh 457
Lutton *v.* Rodd..... 450
Lymonds *and* Cloberry..... 561
Lyddon *v.* Lyddon 165
Lyne *v.* Willis.....524, 525
Lyon *v.* Chandos..... 158
Lyster *v.* Dolland 52. 55

M.

M'Cartney *and* Hewitt..... 338
Macclesfield (Earl of) *v.* Fitton.....315. 319. 444
Mace *v.* Cadell..... 266
Machell *v.* Clarke 213
Mackenzie *v.* Robinson...59. 233
Mackreth *v.* Symmons 240. 248. 249, 250. 252. 254. 258. 376
Mackworth *v.* Thomas 456
Maclean *and* Knight.....*ibid.*
M'Leod *v.* Drummond 177. 180, 181, 182. 184
M'Queen *v.* Farquhar...374. 383
Maddock *v.* Rumball and another 303
Maddocks *v.* Wren 558

Page
Maidwell *and* Corbet...137. 146. 170
Maire, *ex parte* 362
Mallack *v.* Galton 524, 525. 527
Man *and* Drury 103
Manlove *v.* Bale 127. 319. 354. 392
Manners *v.* Burgess 452
——— *and* Brizick..... 200
——— *and* Stanhope 448, 449. 518
Manning *v.* Spooner 487. 490
——— *and* Baxter..... 395
Manory *and* Southcoat 547
Mansel *and* Floyd 543
Mansell *and* Lloyd..... 516
Margrave *v.* Le Hook..... 402
Marlborough (Duchess of) *and* Brace 239, 240. 246. 417. 429
Marlow *v.* Smith 571. 582
Marnell *and* Blake 187
Marsh *v.* Lee 411. 417
Marshall, *ex parte* 360
Marston *and* Perry 40. 545
Martin *and* Style 523
——— *and* Burnell 352. 518
——— *and* Barron 544
——— *v.* Mowlin 544. 570
Martlett *and* Evans 270
Mason *and* Lickbarrow 272
Mattheson *v.* Hardwick 501
Matthews *and* Flyn 263
——— *v.* Wallwyn 315. 319. 560
——— *v.* Downman..... 312
Mattison *and* Greaves...139. 169
Page
Maundrell *v.* Maundrell 377
Maxims in Equity 530
Maxwell (Sir Geo.) *v.* Lady Montacute 24, 25
Maxwell *v.* Wettenhall..... 189
May *and* Bartholomew 483. 485
—— *and* Davis 556
Mayer *and* Duke of Ancaster....459. 464. 479. 492. 499, 500
Mayling *and* Atkinson 263
Maynard *and* Nicholls 448
Mayne *and* Woodcock 553
Mayor of Norwich *v.* Berry 70
——— of Carlisle and others *v.* Blamire 124
Mead *v.* Hide..... 463
Mead *v.* Lord Orrery 179. 182. 597
—— *and* O'Neale 483
Mears *and* Doe 235
Meeker *v.* Tanton 520
Meers's (Sir Thomas) Case... 488
Meggott *v.* Mills..... 263
Mellish *and* Merrywether... 313
Mellor *v.* Lees 29
Meredith *and* Woodhouse... 570
——— *and* Jones 541
Merryland *and* Wilkinson... 567
Merryman *and* Elliott..... 180
Merrywether *v.* Mellish..... 313
Mertins *and* Lacam ...319. 354. 392. 503. 504
——— *v.* Jolliffe..... 374
——— *and* Lacon 127. 248
Mestaer *v.* Gillespie 222. 284. 288. 295. 296

Page
Metcalf *v.* Scholey..... 52
——— *and* Wilson 392
——— *and* Demainbray 408
Meux, *qui tam*, *v.* Howell ... 261
Mew *and* Cornish..... 552
Meyrick *and* Adams 465
——— *and* Attorney-General 566. 568. 591
Michael's, St. (Inhabitants of) *and* Rex 332
Middleton *and* Backhouse... 168
Milksopp *and* Johnson 457
Mill *and* Hiern...202, 203. 378, 379
——— *and* Holt..... 413. 431
Miller *and* Underwood..... 293
Mills *v.* Bank..... 173
——— *and* Meggott 263
——— *and* Thurston 100
——— *and* Grant..... 249
Milward *and* Berrisford..... 427
Minnethorpe *and* Gray 463. 466
Mitchell *and* Doe 102
Mitford *v.* Mitford ...215. 383. 534
——— *v.* Featherstonhaugh 438
Mocatta *v.* Murgatroyd 389. 393. 427
Molesworth *and* Gregory ... 526
Mondey *v.* Mondey 512
Money *and* Kinnoul 503
Monk *v.* Pomfret..... 537
Montacute (Lady) *and* Sir George Maxwell 24, 25
Montague *and* Fairfax 544
Montgomerie *v.* Marquis of Bath..... 520
Moore *and* Pollexfen... 248. 254
Page
Moore and others *and* Jennings 230
Mordaunt *and* Noys 530. 570
Morecock *v.* Dickens..... 384
Morecraft *and* Broadway.... 438
Morgan *and* Goodtitle..... 428
——— *and* Lowe..... 520
——— *and* Corder 134
——— *and* Glassecock 74
——— *and* Hannam 112
Morgan, *ex parte*..... 566. 585
Morley *and* Hyde 85
——— *and* Wright 534
Morly *v.* Elways 547
Morrett *v.* Paske...321. 397. 399. 414. 563, 564
——— *v.* Westerne..... 523
Moss *v.* Gallimore 329. 334
——— *v.* Charnock 282
Mountford *v.* Scott 380
Mountfort, *ex parte* 200, 201. 205, 206
Mouys *v.* Leake and another 234
Mowlin *and* Martin 544. 570
Moxon *and* Palmer..... 285
Munday *and* Duke of Leeds 575, 576. 583
——— *and* Attorney-General..... 568
Munden *and* Collett..... 404
Murgatroyd *and* Mocatta ...389. 393. 427

N.

Nairn *v.* Prowse... 249, 250. 254
Naish *and* Tourville..... 390

Page
Nangle *and* Lewis 500. 503, 504. 538
Napier *v.* Effingham 525, 526
——— *and* ——— 499
Nash *v.* Preston 44
Neal *v.* Attorney-General 443. 445
Needler *v.* Deeble 559
Newby *v.* Cooper..... 408
Newcomb *v.* Bonham 21, 22. 35
Newcome *and* Bonham 517
Newland *and* Beresby 150
Newnham *and* Leman...499, 500
Newman *and* Farr..... 182
——— *and* Thorne..... 561
Newport's Case..... 377
Newsome *v.* Thornton ... 269. 274
Nicholls *v.* How 101
——— *v.* Maynard 448
——— *and* Hardingham 390
Nissen and another *and* Salomons 274
Noke *v.* Darby 463
Norris *v.* Wilkinson..... 198. 206
——— *v.* Le Neve 380
Northwick (Lord) *and* Tait 461. 468
Norton *and* Hobbs..... 427
Norwich (Mayor of) *v.* Berry..... 70
Nosworthy *and* Wood..... 531
Novosielski *v.* Wakefield..... 515
Noy *v* Ellis..... 530
Noys *v.* Mordaunt.....530. 570
Nugent *v.* Gifford.....177. 180. 182

O.

Page
Oates *and* Procter 545
Ockenden, *ex parte*..... 310
O'Dea *v.* O'Dea..... 313
Odell *and* Baddam..... 443. 559
Okeden *v.* Okeden..... 168
Okeley *v.* Lewin 58
O'Neal *v.* Mead 483
Onslow *v.* Pope 402
Orby *v.* Trigg..... 27
Ord *v.* Smith 543. 545
Orde *v.* Heming.....208. 546
Ormsby *and* Crofton..... 379
Orrery (Lord) *and* Mead 179. 182. 597
Osborne, *ex parte* 361
Ossulston *v.* Yarmouth 438
Otto Lewis, *ex parte* 363
Oughton *and* Bagot...499. 503, 504
Outram *and* Bradshaw 521
Owen *v.* Griffith..... 66
Oxford *v.* Lady Rodney..... 496
Oxford (Lord) *and* Cholmley 515
Oxford (Earl of) *and* Langley 177, 178
Oxwick *v.* Plumer..... 228

P.

Pack *and* Heir of Cannon ...393. 423
Packer *v.* Wyndham 534
Packington *v.* Barrow 536
Paine *and* Bishop of Winchester 515. 523

Page
Palk *v.* Lord Clinton ...186. 553
Palmer *and* Knowles 74
——— *v.* Wheeler..... 187
——— *v.* Jackson..... 546
——— *v.* Moxon 285
——— *v.* Knollis 74
Palmes *v.* Danby 540, 541
Papworth *and* Allen 559
Parker *and* Dixon 25
——— *and* Strode 448
——— *and* Barwell 189
——— *and* Codrington 596
——— *and* Jackson 548
Parkinson *and* Rees..... 518
Parsons *v.* Freeman 493
——— *and* Zouch 358, 359
——— *and* Cooke 188. 526
Parteriche *v.* Powlett 503
Paske *and* Morrett 321. 397. 399. 414. 563, 564
Pasley *v.* Freeman..... 427
——— *and* Lempriere...270. 275
Paterson *v.* Tash..... 269
Pawlett *v.* Attorney-General 42. 44
Payler, *ex parte*..... 247
Peachey *and* Young 25
Pearson *v.* Pulley 561
Peate, *ex parte* 249
Peck *and* Bacon..... 74
Penner *v.* Jemmatt 428
Penrhyn (Lord) *v.* Hughes 368. 445
Penson *and* Plunkett 54. 57
Perceval *and* Bassett 497. 501
Perkins *v.* Bayntwn 497. 500
——— *v.* Walter 59
Page
Perkins *and* Reynoldson 522. 528
Perrie *and* Price.....22. 27
Perry *v.* Barker 516
——— *v.* Marston..... 40. 545
——— *v.* Bowers 102
——— *and* Curtis 287
Peter *v.* Russel 428
Pettat *v.* Ellis 454
Petty *v.* Styward 532
Phillips *v.* Hele.....47. 538
——— *v.* Vaughan 321. 562
——— *v.* Phillips 465
——— *and* Brydges 467. 470
——— *and* Taylor 524
Phipps *v.* Bishop of Bath and Wells 596
Pickerell *and* Aggus 543
Pie *v.* Daubuz and another... 219
Pierce *and* Smith 356
——— *and* Acton 539
Pierpoint *v.* Lord Cheney ... 164
Pigeon *and* White..... 546
Pilkington *v.* Shaller ... 119. 126
Pitcher *and* Rogers 66
Pink *and* Walker..... 462
Placknet *v.* Kirk 57
Pledwell *and* Thomas 69
Plumb *v.* Fluit 428
Plumer *and* Oxwick..... 228
Plunket *v.* Penson 54. 57
Plymouth (Earl of) *and* Ridout..... 188
Pockley *v.* Pockley.....457. 484
Pocock *v.* Lee.. 503
Pollexfen *v.* Moore 248. 254
Pomfret (Lord) *v.* Lord Windsor 375. 424

Page
Pomfret *and* Monk..... 537
——— *and* Tribourg 403
Pope *and* Haslewood....461. 466
—— *and* Goodtitle 338
—— *v.* Onslow 402
Porter *v.* Hubbard 319. 444
——— *v.* Emery..... 356
——— *and* Donisthorpe 500
——— *and* Fry..... 378
Potter *and* Kirby 399
Potts *v.* Layton 56
Povey *and* Edmunds ...413. 430
Powell *v.* Glover 565
——— *v.* Bartholomew 16
——— *and* Croft 129
Power *and* Drew 559
Powis *v.* Corbet....398, 399. 487
Powlett *and* Parteriche 503
Powseley *v.* Blackman 328
Prescott *and* Snee 270
Preston *v.* Tubbin 388
——— *and* Nash 44
Preswick *and* Walker..... 249
Price *v.* Perrie 22. 27
—— *v.* Anderson 297
—— *v.* Fastnedge..... 398
—— *v.* Williams 596
—— *and* Hill 519
—— *and* Howell 207. 457. 485. 517. 546
Priest *and* Hunt..... 594
Procter *v.* Cowper 442. 544. 560
——— *v.* Oates..... 545
Prosser, *ex parte* 361
Protheroe *and* Brummel 460. 468
Prowse *and* Nairn 249, 250. 254

Page
Pulley *and* Pearson 561
Purbeck *and* Putten 64
Purchase *and* Cotterell ...28. 106
Purefoy *v.* Purefoy 401
Putten *v.* Purbeck..... 64
Pym *and* Sweet 314

Q.

Quarrell *v.* Beckford...556. 561. 596
Queinton *and* Kite 113
Quincy, *ex parte* 268

R.

Rakestraw *v.* Brewer...127. 527. 545
Ramsden *v.* Langley 392. 535
Rand *and* Tourle...214. 218. 428
—— *v.* Cartwright..... 540
Ravenhill *v.* Dansey 164
Reade *and* Roe 577
Reed *and* Fenwick..... 209
—— *and* Wright 453
—— *and* Aynesley 541
Rees *and* Parkinson 518
Reeves *and* Walker 120
——— *and* Hardy 354, 392. 543, 544
Regina *v.* Arnold 102
Renforth *v.* Ironside..... 419
——— *v.* Belchier 421
Reresby *v.* Newland..... 150
Revel *v.* Watkinson 446
Reynoldson *v.* Perkins 522. 528
Rex *v.* Allnutt 96

Page
Rex v. Delamotte 61
—— v. Lord of the Manor of Hendon 115
—— v. Inhabitants of Edington 134
—— v. Inhabitants of Catherington 331. 354
—— v. Inhabitants of St. Michael's 332
Rhodes *and* Ibbotson..... 427
Rich *and* Booth ...512. 524. 526
Richards v. Sims 38
Richardson *and* Wyndham 424
———— *and* Turner 123
Richmond v. Tayleur 524
———— *and* Turner 420. 424
Rider v. Wager 483
Ridgard *and* Bonney....180. 183
Ridley *and* Rowley 597
Ridout v. Earl of Plymouth 188
Ritche v. Saint Barbe 286
Rivers (Earl of) v. Earl of Derby.....169. 175, 176
Rivers *and* Goodall..... 153. 169
Roberts v. Dixall 187
——— v. Kuffin 559. 591
——— v. Tremayne..... 307
Robinson v. Tong 67. 508
———— *and* Mackenzie ...59. 233
———— v. Litton 342
———— v. Davison 420
———— v. Gee..... 503
———— *and* Fereyles 459. 461
Robson *and* Bayly 399
Rochfort (Earl of) *and* Belvidere.....493. 498
Rodd *and* Lutton 450
Page
Rodney (Lady) *and* Earl of Oxford 496
Roe v. Jones 47
—— v. Hicks 116
—— v. Reade 577
—— v. Solly 403
Rogers *and* Gibson..... 168
——— v. Pitcher..... 66
Rolleston and others v. Hibbert and others ... 278. 295
Rolleston and others *and* Hibbert and others 279
——— v. Smith 279
Rorke v. Dayrell 96
——— *and* Webb 354. 364. 392
Roscarrick v. Barton.....41. 522
Rose *and* Brown..... 236
Round *and* Cason 429
Rous (Lord) *and* Tower 461. 474
Rowe *and* Trewbella 297
Rowel v. Walley.....549. 552
Rowles *and* Ryal...266, 267, 268
Rowley v. Ridley 597
Rowntree v. Jacob 248
Royce *and* Hamilton..... 381
Royston *and* Bucknell 264. 268
Ruffin, *ex parte*..... 266
Rumball and another *and* Maddock 303
Ruscomb *and* Kemys 76
Ruscombe v. Hare 547, 548
Russell v. Russell..... 197
——— *and* Webb 348
——— *and* Peter..... 428
——— *and* Strode 569. 571. 588
Russel *and* Stokes 350
Rushforth v. Hadfield 312

Page

Ryal *v.* Rowles ... 266, 267, 268
Rybot *and* Bonafous 448

S.

Sabine *v.* Barrell 39
Sackett *v.* Bassett 440
Sadleir and others *and* Traherne 118
Sadler *v.* Bush 430
Sagittary *v.* Hyde 507
Sainsbury *and* Whetstone ... 371
Samwell *v.* Wake 461
St. Alban's (Duke of) *and* Colman 332. 556
St. Barbe *and* Ritchie 286
St. Eloy *and* Serle 484
St. John *and* Ashburnham... 68
——— *and* Biddulph 387
——— *v.* Turner.....543. 546
St. Michael's Inhabitants of *and* Rex 332
Sall *and* Schoole and another 109. 352. 518
Salisbury *and* Focus 356
Salomons *v.* Nissen and another 274
Samwell *v.* Wake 461
Sanders *v.* Kentish and Hawksley 301
Sandys *v.* Sandys 149. 169
Sargeson *v.* Cruise..... 447
Saunders *v.* Dehew 517
Savignac *v.* Cuff..... 274
Savile *v.* Savile 148
Saville *and* Dixon..... 48
Saville's Case 232
Sayle *v.* Freeland 525

Page

Scarborough (Earl of) *and* Worseley 388
——— (Earl of) *and* Sharpe 56. 58
Scarfe *and* Casborne 42. 48. 60. 572. 588
Schiott *and* Silberschildt ...517. 568
Scholey *and* Scott..... 52
——— *and* Metcalf*ibid.*
Schoole *and* another *v.* Sall 109. 352. 518
Scott *v.* Scholey 52
—— *v.* Brest 367
—— *v.* Beecher...458. 491. 497, 498
—— *and* Benson.....112. 115
—— *and* Attorney-General 51
—— *and* Archer 397
—— *and* Mountford 380
—— *v.* Tyler 179, 180, 181. 183
Scrafton *and* Kennebel 112
Scrughan *and* Tardiff 251
Seale *and* Lucas 512
Sealey *and* White 456
Sedgwick *and* Hitchcock...388. 430
Selby *and* Galley 59
——— *and* Stafford..... 245
Senhouse *v.* Earl 511. 528
Sergison, *ex parte* 359, 360. 576
Serle *v.* St. Eloy 484
Seton *and* Clarke 456
Sewell *and* Legat 48
——— *and* Berney..... 596
Seymour *v.* Greenvill..... 75
——— *and* Clinton...146. 158. 165

Page
Shafto v. Shafto 497. 499
Shallcross v. Finden 469
Shaller v. Pilkington ... 119. 126
Sharbrook *and* Hull..... 113
Sharpe v. Earl of Scarborough 56. 58
——— *and* Clay 132
Sharpnell v. Blake and others 397. 399. 450. 452
Shawcross *and* Kirkman 311
Shephard v. Elliott..... 556
Shepherd v. Titley..... 423
——— v. Johnson..... 303
Sherman v. Cox ... 522, 523. 559
Shirley v. Ferrers..... 186
——— v. Watts..... 539
Shirt v. Westby..... 189
Short *and* Wishal 516
Shrewsbury (Duke of) *and* Sir John Talbot 188
——— v. Shrewsbury 168
Shrimpton *and* Conway..... 545
Shuttleworth *and* Laycock...398. 401
Silberschildt *and* Schiott 517. 568
Simonds v. Lawnd..... 111
Simpson *and* Cowell 248. 314
——— *and* Hill..... 183
Sims *and* Richards..... 38
Skinner v. Stacy 339
Skip v. Wyatt 392. 521
——— *and* West.....264. 267
Skipwith *and* Daniel ...512. 521
Slattery *and* Burton 449
Small v. Wing 169. 176
Smallwood *and* Walker 388
Smartle v. Williams 328, 329
Page
Smart v. Hunt 544
Smith v. Evans 159
——— v. Smith 175. 264
——— v. Hibbard 248
——— *and* Dixon 597
——— v. Lowe 378
——— *and* Dickenson 597
——— *and* Jones 397. 400. 403, 404. 406. 408
——— *and* Marlow 571. 582
——— *and* Wiltshire 451
——— *and* Angel 596
——— *and* Dolman 461. 464. 466
——— *and* Hall 378, 379
——— *and* Thompson...285. 288
——— *and* Sparkes..... 119. 126
——— *and* Kirkham 48
——— *and* Rolleston 279
——— *and* Darby 268
——— v. Vallance 535
——— v. Pierce 356
——— *and* Ord..... 543. 545
——— *and* Thomlinson..... 178
Smith, *ex parte* 362
Snatt *and* Archer 397
Snee v. Prescot 270
Solley v. Gower 56, 57
——— *and* Roe 403
Sorrel v. Carpenter 388
——— *and* Williams... 315. 318
South *and* Cooper 297
Southcoat v. Manory..... 547
Southcote *and* Harrison..... 248
——— *and* Sweet 374
Sparkes v. Smith 119. 126
Sparr *and* Dewar 434

Page
Speldt *v.* Lechmere.....288. 298
Spence *and* Knowles 543. 556
Spencer *and* Hampton 26. 36
——— *v.* Boyes..... 525
Spooner *and* Manning 487. 490
Sprainger *and* Ballett..... 552
Springfield *and* Williams ... 321. 562. 564
Spurgeon *v.* Collier 543
Spurling *and* Burgaine 113. 116
Stacy *v.* Skinner 339
Stafford *v.* Selby 245
Stainbridge *and* Jolland..... 378
Stanhope *v.* Thacker 169
——— *v.* Earl of Verney 252
——— *v.* Manners...448, 449. 518
Staniforth *v.* Staniforth 143
Stanley *v.* Stanley.....145. 156
Stapleton *v.* Colville 461. 465
——— *and* Conway 432
Stapilton *v.* Stapilton....214. 232
Stapeley *and* Butcher..... 378
Statham *and* Joynes 25
Steere *and* Joulmin 380
Stephens *v.* Dethick ... 145. 157
——— *v.* Stephens..... 268
Stephenson *v.* Heathcote 464, 465. 476
Stevenson *v.* Blakelock 312
——— *v.* Hayward 422
Stibbert *and* Taylor..... 378
Stileman *v.* Ashdown..... 73
Stillingfleet *and* Hayward... 232
Stockpole *and* Gore 516
Stokes *v.* Russell..... 350
Stonard *and* Burting 177, 178
Page
Stone *v.* Evans 123
——— *and* Sutton...113. 214. 519
Stonehewer *v.* Thompson.... 539
Story *v.* Lord Windsor 390
Stowell *v.* Lord Zouch 370
Strathmore (Earl of) *and* Davis 69. 388. 431
Stringfellow's Case..... 99
Strode *v.* Russel ...569. 571. 588
Strode *v.* Parker 448
Strong *v.* Teat 578
Stuckville *v.* Dolben 517
Sumner *and* Uppom 95
Sutton *v.* Stone 113. 214. 519
——— *and* Banks 49
Style *v.* Martin..... 523
Styward *and* Petty 532
Sweet *v.* Pym 314
——— *v.* Southcote..... 374
Sykes *and* Coruel..... 542
Symmes *v.* Symonds 424
Symonds *and* Symmes*ibid.*
Symmons *and* Mackreth ...240. 248, 249, 250. 252. 254. 258. 376

T.

Tabor *v.* Grover 531
Tait *v.* Lord Northwick 461. 468
Talbot *v.* Braddyl 34. 207
——— (Sir John) *v.* Duke of Shrewsbury 188
Tancred *and* Gould 556
Taner *v.* Ivie 183
Tankerville *and* Astley 503
——— *v.* Fawcett 500
Tanner *and* Chapman...248. 558

Page
Tanton *and* Meeker 520
Tardiff *v.* Scrughan 251
Tasburgh *v.* Echlin 31
Tash *and* Paterson 269
Tate *v.* Austin 503
—— *v.* Wellings.....303. 306
Tayleur *and* Richmond..... 524
Taylor *v.* Cole 66
—— *v.* Hawkins 185. 419
—— *v.* Haylin 559
—— *v.* Wheeler ... 223. 279
—— *v.* Stibbert..... 378
—— *v.* Phillips 524
Teat *and* Strong..... 578
Tebbutt *and* Harvey 516
Templar *and* Hodges..... 69
Tew *v.* Lord Winterton..... 456
Thacker *and* Stanhope 169
Thawill *and* Eccles 398
Thomas *and* Lake..... 544
—— *v.* Pledwell 69
—— *and* Mackworth 456
—— *and* Watts 541
Thomlinson *v.* Smith..... 178
Thompson *v.* Smith 285. 288
—— *and* Stonehewer 539
—— *v.* Grant.....531. 590
Thornbrough *v.* Baker 530
Thorne *v.* Thorne 46. 59. 540
—— *v.* Newman 561
Thornhill *v.* Evans 438. 442
Thornton *and* Newsome 269. 274
Thunder *v.* Belcher 328
Thursby *and* Lloyd 502
Thurston *v.* Mills 100
Tilly *v.* Egerton 529
Tinkler *v.* Walpole 297
Tipping *v.* Tipping 483

Page
Titley *v*, Davies 403
—— *and* Shepherd 423
Tofield *and* Doe 114. 116
Tong *and* Robinson 67. 508
Tooke *v.* Hartley 516
—— *v.* Bishop of Ely 517
—— *v.* Glasscock 213
Tooms *v.* Chandler..... 598
Topp *and* Davies 487
Tourle *v.* Rand 214. 218. 428
Tourville *v.* Naish 390
Tower *v.* Lord Rous 461. 474
Tracey *and* Jenner 542
—— *v.* Hereford 446
Trafford *v.* Ashton..... 169
Traherne *v.* Sadleir and others 118
Tredway *v.* Fotherly 112
Tremayne *and* Roberts..... 307
Trew, *ex parte* 206
Trewbella *v.* Rowe..... 297
Tribourg *v.* Lord Pomfret... 403
Trigg *and* Orby..... 27
Trimleston *v.* Hamill 561
Trimmer *v.* Baynes.....258. 506
Troughton *v.* Binkes 537
—— *v.* Troughton 399
Tubbin *and* Preston 388
Tucker *v.* Wilson 309
Turner *v.* Gwinn 48
—— *and* St. John....543. 546
—— *v.* Richardson 123
—— *v.* Richmond ...420. 424
—— *v.* Crane 532
Turner's Case 530
Tweedale *v.* Coventry..... 485
Tweddell *v.* Tweddell...492. 498
Twyne's Case..... 262

Page

Tyler *and* Scott 179, 180, 181. 183
Tyndall *and* Attorney-General 506

U.

Underwood *v.* Lord Courtown 386
——— *v.* Miller..... 293
Uppom *v.* Sumner..... 95
Uton *and* Atkins..... 40

V.

Vallance *and* Smith 535
Vanderzee *v.* Willis 399
Vaughan *and* Phillips...321. 562
Vaughan *v.* Atkins..... 115
Vawdry *and* Vernon 559
Verney (Earl of) *and* Stanhope 252
Vernon *v.* Doe 114
——— *and* Jackson 122. 296
——— *and* Lee..... 127
——— *v.* Bethell 547
——— *and* Vawdry 559
Vigor *and* Attorney-General 570
Vigures *and* How...512. 521. 570

W.

Wade *and* Beckford and others 542
Wade's Case.....14, 15. 20
Wager *and* Rider 483
Wainwright *v.* Bendlowes ...465, 466
Waise *v.* Whitfield..... 465
Wake *and* Samwell 461

Page

Wakefield *and* Hacket and Bedel 411
——— *and* Novosielski 515
Wakerell *v.* Delight 340. 515
Walker *v.* Walker 25
——— *v.* Reeves 120
——— *v.* Preswick 249
——— *v.* Burnell 268
——— *v.* Smallwood..... 388
——— *v.* Jackson 461. 463. 465
——— *v.* Bell 597
——— *v.* Pink 462
——— *and* Billinghurst 501
Walley *v.* Walley 374
——— *and* Rowel.....549. 552
Wallscourt (Lord) *and* Aldridge 461. 474
Wallwyn *and* Matthews ...315. 319. 560
Walmesley *v.* Booth..... 448
Walpole *and* Tinckler 297
Walsh *and* Hartpool 207, 208
Walter *and* Perkins 59
Warburton *v.* Warburton ... 168
Ward *and* Garth...388. 515. 523
——— and others *and* Jennings 26
——— *and* Waring 493. 496
Waring *v.* Ward.....*ib. ib.*
Warner, *ex parte* 204
Warwick *and* Edwards 453
Waterhouse *and* Close 312
Watkins *v.* Ashwick 453
Watkinson *and* Revel 446
Watson *v.* Brickwood 459. 461. 472
——— *and* Godfrey ...66. 127. 319. 353, 354. 392

Page
Watts *and* Shirley 539
——— *v.* Thomas 541
Wayland *and* Wildgoose 378
Webb *v.* Russell 348
——— *v.* Rorke 354. 364. 392
——— *v.* Jones 466
Webber *v.* Hunt 556
Welden *v.* Dux Ebor. 370
Wellings *and* Tate 303. 306
Welsh *and* Beck 216
——— *and* Frosell 114
Westby *and* Shirt 189
West *and* Gomme 597
——— *v.* Skip 264. 267
——— *and* Barthorp 540
Westerdell *v.* Dale 123. 286. 296
Westerne *and* Morrett 523
Weston *and* Barnett 414. 428
Wettenall *and* Maxwell..... 189
Wetherell, *ex parte*..... 203
——— *v.* Collins 392
Whale *v.* Booth 181, 182
Wharton *and* Doe..... 66
Wheate *and* Burgess 60, 61. 248
Wheeler *and* Palmer 187
——— *and* Taylor 223. 279
Whetstone (Lady) *v.* Sainsbury 371
Whichelo *and* Doe..... 214
Whitacre, *ex parte*..... 586
Whitbread, *ex parte*...196. 198. 202. 206
White *v.* Hussey 355
——— *and* Whiting 545
——— *v.* Ewer 33. 542
——— *v.* Pigeon..... 546
——— *v.* Sealey 456
——— *v.* White 463. 552
Whitfield *and* Waise 465
Whiting *v.* White 545
Widdowson *v.* Duck..... 192
Wigg *v.* Wigg.....239. 390
Wightwick *and* Fowler 556
Wilbraham *v.* Bromhall 463
Wilcox *and* Kruger 312
Wilde *v.* Clarkson 456
Wildgoose *v.* Wayland 378
Wildman *v.* Wildman 299
——— *ex parte* 505
Wilkes *v.* Bodington 338. 424
Wilkins *and* Jeanes 70
Wilks *and* Vanderzee 399
Wilkinson *v.* Merryland 567
——— *and* Norris... 198. 206
Willett *v.* Winnell 27
Williams *and* Smartle...328, 329
——— *and* Wood 520. 521
——— *v.* Bosanquet 126. 296
——— *and* Price 596
——— *v.* Sorrel 315. 318
——— *v.* Chitty..... 469
——— *and* Hughes...557. 561
——— *v.* Day 559
——— *v.* Springfield 321. 562. 564
Williamson *v.* Gordon 524, 525
Willie *v.* Lugg 407
Willis *v.* Fineux..... 371
——— *and* Lyne 524. 526
——— *and* Vanderzee 399
Willoughby *v.* Willoughby 378. 431
Wilson, *ex parte* 329. 333. 352. 556
Wilson *v.* Metcalfe 392
——— *v.* Harman 453
——— *v.* Darlington..... 502

Page

Wilson *v.* Heather 292. 295
——— *v.* Fielding 58. 509
——— *and* Tucker 309
Wiltshire *v.* Smith 451
Winch *and* Coleman ...397, 398, 399. 409
Winchelsea (Earl of) *and* Finch 71
Winchester (Bishop of) *v.* Paine 515. 523
——— *v.* Beavor 523, 524, 525
Wind *and* Baker 107
Windham *and* Bamfield 461. 465
——— *v.* Jennings 395. 398
Windsor (Lord) *and* Lord Pomfret 375. 424
——— *and* Story 390
Wing *and* Small 169. 176
Winnell *and* Willett 27
Winterton (Lord) *and* Tew 456
Wishal *v.* Short 516
Witherby *and* Clench 26
Witherington *v.* Banks 354. 371
Wodhave *and* Howes 521
Wood *v.* Williams 520, 521
——— *v.* Nosworthy 531
Woodcock *v.* Mayne 553
Woodford *and* Hanman..... 84
Woodhouse *and* Meredith... 571
Woods *v.* Huntingford 495
Woolston *v.* Ashton 36
Worcester's (Earl of) Case... 75
Worley *and* Hamilton...500, 501
Worsley *v.* Earl of Scarborough..... 388

Page

Wortley *v.* Birkhead 239. 390. 410. 421
Wren *and* Maddocks..... 558
Wride *v.* Clarke..... 488
Wright, *ex parte* 195
——— *v.* Morley 534
——— *v.* Campbell ...270. 274
——— *v.* Reed..... 453
——— *and* Birch 326. 343
Wrighton *v.* Hudson 383
Wrigley *and* Andrew 177. 180. 183, 184. 374
Wroot *and* Doe 112
Wyatt *and* Skip 392. 521
Wylie *and* Bryson..... 268
Wyndham *v.* Richardson ... 424
——— *and* Packer..... 534
Wynn *v.* Littleton 530. 571
Wyse *and* Lady Holles 448

Y.

Yallop, *ex parte*..... 287
Yarmouth *and* Ossulston..... 438
Yates *v.* Hambly...208. 522. 546
York Buildings Company *and* Higgins..... 72
Young *v.* Peachey 25
——— and another *v.* Brander and another 297
——— *and* Barnard 304

Z.

Zouch *v.* Parsons 358, 359
——— (Lord) *and* Stowell... 370

TABLE OF STATUTES.

EDWARD I.

Page

11. (Acton Burnell) 63
13. cap. 18.....*ibid.*
— stat. 3..... 77
18. 6

EDWARD III.

27. stat. 2. cap. 9...80. 81, 82. 84

HENRY VIII.

23. cap. 6.....82, 83. 87. 89
27. cap. 16..... 102
32. cap. 5. 74. 87
— cap. 34..... 348
33. cap. 39.....93. 98, 99. 102
37. cap. 9..... 6

ELIZABETH.

13. cap. 4.....61. 101
— cap. 5. 65. 260. 263. 267, 268
— cap. 20.....234, 235, 236

JAMES I.

21. cap. 9. sect. 12..... 214
— cap. 16..... 542
— cap. 19. sect. 9..... 394
———— sect. 10, 11. ... 265. 268

CHARLES I.

3. cap. 4. sect. 2. 234. 236

CHARLES II.

Page

12. cap. 24..... 7
29. cap. 3. (Statute of Frauds) sect. 4. 195
————10. 51
————14. 69
————15.*ibid.*
————16. 70
————18. 87

WILLIAM AND MARY.

3. cap. 14. (Fraudulent Devises) 187. 396
4 & 5. cap. 20. 69
7 & 8. cap. 25.....354. 367

WILLIAM III.

4 & 5. cap. 16..... 242. 527
7 & 8. cap. 22. Navigation Act 276, 277
————25. sect. 7. 331
————36. ——— 69

ANNE.

4. cap. 16. sect. 12..... 76
5. cap. 18..... 90
6. cap. 2. (Irish).....385
— cap. 35..... 90
7. cap. 19..... 356
— cap. 20..... 90

Page

9. cap. 5. 354. 368
12. stat. 2. cap. 16.....432. 437

GEORGE I.

8. cap. 25.....87, 88

GEORGE II.

4. cap. 10..... 362
7. cap. 8. (against Stock-jobbing) 300. 302
— cap. 20.....335. 515. 555
8. cap. 6..... 90
9. cap. 36. (Mortmain Act) 591

GEORGE III.

14. cap. 79..... 432. 435
25. cap. 35..... 61
26. cap. 60..... 277. 283

Page

34. cap. 68.....281. 283
37. cap. 91. sect. 8..... 15
38. cap. 87. sect. 6 & 7..... 360
43. cap. 84..... 236
46. cap. 135.... 374. 388
47. sess. 2. cap. 74..... 56
49. cap. 121..... 388
52. cap. 50..... 15
55. cap. 184. (Stamp Act)...108. 127. 322. 598
— cap. 192..... 112
57. cap. 99..... 236
———117..... 103
59. cap. 120..... 592

GEORGE IV.

1 & 2. cap. 51..... 485

INDEX.

Page

ACCOUNT.

Mortgagor not liable to account for rents and profits 332. 334. 555

Assignee of mortgage subject to account in like manner as assignor, if assignment be without mortgagor's concurrence.....315. 318

Qu.? if debt be assignable at law 322

Mortgagee in possession liable to account for rents and profits 320

Even after assignment, if made without mortgagor's concurrence..... 355. 368. 561

Not liable for actual value, or by proof of what the land is worth, except in case of wilful default.....355. 557

If mortgagee permit tenant for life to run interest in arrear, and afterwards purchase the estate for life, and enter, the surplus rents above the accruing interest shall be applied in discharge of the arrears 369

Page

If a term be created for raising money out of annual profits, and mortgagee permit mortgagor to receive the rents, he must account for them..... 370

An account stated is not sufficient evidence of intention to convert interest into principal 439

Account kept by mortgagee within twenty years will save the right of redemption 544

But not by a receiver *ibid.*

Of accounting 555

Reference to Master under 7 Geo. 2. cap. 20.: mortgagor bound by sum charged in bill *ibid.*

Sums received since the decree, must be brought into account *ibid.*

Master not to make annual rests unless specially directed..... 556

There must be a special order for an allowance of improvements *ibid.*

Page
Mortgagee cannot charge for his own trouble 556
Mortgagee in possession responsible if he act *malâ fide* 557
Vide *Mortgagee.*
Account taken between mortgagor and first mortgagee binds subsequent incumbrances, although not parties to suit 559
And so between mortgagor and tenant for life binding on contingent remainder coming afterwards into *esse* *ibid.*
Between mortgagor and assignees of bankrupt binding on all claiming under the bankrupt *ibid.*
Taken during minority binding on infant *ibid.*
Always subject to be opened for fraud *ibid.*
Or mortgagor may point out specific errors, and surcharge and falsify, but not go into general account ... *ibid.*
General rule that a settled account shall not be opened unless particular errors pointed out 560
Solicitor taking security for an unsettled account subject to a general account in equity *ibid.*
Or if he admit error generally in a settled account..... *ibid.*
And if (being mortgagor) be with consent charge poundage, without giving due information of the law to his client 560
Second account taken from the foot of the first *ibid.*
Mortgagor need only make the last assignee of the mortgage, party to his bill for an account..... 561
Mortgagee not allowed expences for opening mines or quarries *ibid.*
But allowed expences in renewing leases necessary repairs, lasting improvements, and costs *ibid.*

ACCOUNTANT TO THE CROWN.

Lands of, bound from what time 101
Vide *Crown Debts.*

ADMINISTRATION.

Granted *durante minoritate*... 360

ADVOWSON.

Mortgagee must present on vacancy..... 60. 233. 341. 370
Cannot agree to the contrary 233. 370
If mortgagee present, mortgagor may compel resignation 233
Advowson not extendible *scandle* 67
Not an eligible security for mortgage 233
Mortgage of, should always

Page

be in fee and contain power of sale 234

AGENT.

Vide NOTICE.

AGREEMENT.

Agreement at time of loan to sell the land to the mortgagee for a given sum in default of payment of mortgage debt, not binding...27. 31
Distinction between the aforegoing and an agreement to give the mortgagee a preference of preemption ... 28
Must be further distinguished from conditional purchases *ibid.*
Whether an absolute conveyance can be converted into a mortgage by agreement subsequent, *semble* not..... 38
To reconvey does not constitute a mortgage, if there be evidence to rebut the presumption 39
Instance of mortgage rendered irredeemable by evidence of title 40

ALIENATION.

General license to alien (except tenants in *capite*) given by statute of *quia emptores* 6
Fine on alienation by tenants *in capite* abolished by 12 Ca. 2. c. 24. 7

Page

ANCIENT DEMESNE.

Lands in, extendible 67

APPOINTMENT.

See POWER, NOTICE.

Persons claiming in default of, may redeem..... 540

ARTICLES.

Mortgage-money articled to be laid out on land, bound by the articles 530

ASSETS.

Are legal or equitable 55, 56
Equitable assets defined 56
How assets are administered *ibid.*
After bill filed to account, executor cannot give preference by confessing judgment..... *ibid.*
Trust estate of inheritance legal assets 57
Equity of redemption equitable assets 54. 57
Trust estate in chattels, equitable assets 52
So equity of redemption of... *ibid.*
Reversion in fee on a mortgage-term, legal assets... 54. 57. 246
Equity of redemption is legal assets *quoad* judgment creditors 56. 58
And the assets will not in such respect be marshalled in favor of simple contract creditors *ibid.*
Equity of redemption is equi-

Page

Or throw up his securities, and prove the whole debt, without prejudice to his collateral securities 505
But cannot retract, after election made *ibid.*
If he prove for residue, cannot charge interest beyond date of commission 505
On mortgage for retransfer of stock, mortgagee may prove the value of stock at date of commission, and dividends due *ibid.*
If commission be taken out prior to time for payment of mortgage, and a breach have been made in the condition of the bond, the mortgagee may prove the whole debt 506
Assignees may redeem..... 539

BANKRUPTCY.
Vide BANKRUPT.

Is not "notice" at common law 388
Whether commission is, *qu.?* *ibid.*
Commission made notice by 46 Geo. III..... *ibid.*
Striking of docket also made notice by 46 Geo. III. but repealed by 49 Geo. III.... *ibid.*
Docketed judgment may be tacked, although no execution sued at time of bankruptcy 394
Commission of, does not resemble a decree to settle

Page

priorities between creditors, which prevents tacking 425
Act of bankruptcy prior to lending, does not prevent tacking..... 429
Whether subsequently to commission, *qu.?*..... 430

BARGAIN AND SALE.
Vide BANKRUPT.

BARON AND FEMME.
Vide HUSBAND AND WIFE.

BENCHERS.
Vide CHAMBERS.

BILL.
Vide REDEMPTION, FORECLOSURE.

BILLS OF LADING.
Mortgage of..... 270
By indorsement the consignee may divest the right of consignor, while in *transitu*... *ibid.*
Although indorsed by consignor in blank..... 273
Factor may sell, but not pledge them..... 274
When there are several bills of lading, preference between *ibid.*
As between consignor and consignee, right of ownership not divested until possession 272
Secus if consignee put his mark on the goods 275

Page

Agreement by consignee to assign, effect of 275

Equitable assignment of goods at sea, valid at law against assignees of bankrupt consignee if he afterwards indorse the bills of lading ... 275

BOND.
Vide TACKING.

May be tacked against heir or devisee of mortgagor, but not against mortgagor himself 396

In respect to tacking of bond debt, it makes no difference whether the bond is prior or subsequent to mortgage or taken by assignment..... 395

Might be formerly tacked against mortgagor *ibid.*

Doctrine altered, no tacking against mortgagor, creditors or other claiming under him for a valuable consideration 396. 398, 399, 400

Nor against other bond or specialty creditors 399

Nor against assignee of heir, or of devisee, or of executor *ibid.*

General rule that interest on a bond shall not go beyond the penalty 456

Exception in case the debt is also secured by mortgage *ibid.*

If mortgagee have also a bond, and mortgagor become bankrupt before time for payment in mortgage-deed, mortgagee may prove under the bond if any breach have been committed in respect of interest 506

Bond for performance of covenants in mortgage-deed, forfeited by breach of proviso 598

Present practice to give bond for debt and interest..... *ibid.*

Should bear even date with mortgage *ibid.*

BOROUGH ENGLISH.
Vide HEIR.

CESTUI-QUE TRUSTS.

May file their bill to foreclose, but must make trustee a party 520

May file their bill to redeem, if trustees refuse 537

CHAMBERS IN INNS OF COURT.

Are within the local jurisdiction of the benchers..... 527

But if benchers decline to act, the courts will interfere ... *ibid.*

Decree for foreclosure may in such case be obtained... *ibid.*

CHARGE.
Vide INTEREST.

Trust on charge for payment of debts incidentally gives a Court of Equity power to mortgage or sell 190

Page

And court may give interest on the mortgage..... 190
Direction in a will that debts and legacies shall be first paid, a charge on real estate 469

CHARITY.

Vide NOTICE, DEVISE.

CHATTELS.

Vide FACTOR.

Bound by judgments only from time of delivery of writ 70
Sheriff may extend a term of years, or sell it to the creditor 73
But if judgment be reversed, the sale will in such case be void..... *ibid.*
Secus, if the sale had been by writ of *fieri facias*..... 74
Fraudulent assignment of, what..... 261
Retention of possession by debtor *primâ facie* proof of fraud 261
Where not proof of..... 263
Et vide *Fraudulent Conveyance.*
Reputed owner becoming bankrupt 265
Although possession of chattels retained by mortgagor may not be fraudulent within 13 of Eliz. yet *secus* in case of bankruptcy within 21 Jac. 268
Mortgagor of chattels dying indebted by simple contract to mortgagee, executor on redemption must pay both debts 398

CHURCH LIVING.

Whether it may be charged by deed, considered...234, *et seq.*
Should be always attended with warrant of attorney to confess judgment and sequestrate the living 237
Usual mode of charge..... *ibid.*

COMMISSION.

Mortgage of West India estate cannot charge commission 353. 367
Unless as consignee..... 353

COMMISSION OF BANKRUPTCY.

Vide BANKRUPT, BANKRUPTCY, NOTICE.

COMMON CARRIERS.

Vide LIEN.

Have not a general lien by usage *semble*..... 312

COMPOUND INTEREST.

Vide INTEREST.

CONDITION.

Mortgage, an estate on condition 10, *&c.*
Not favoured by the common law 12
Strict performance required *ibid.*
Difference between conditions

Page

to preserve and to destroy estates 13
Rules regulating the performance of conditions at common law *ibid.*
If no time appointed, mortgagor had his whole life for performance *ibid.*
Further distinctions, if time appointed..... 14
Distinctions when the money was to be paid to heir, executor, or assign 14
If mortgagee accepted counterfeit coin, a good performance of condition..... 15
An account stated and balance paid, or new security taken, a good performance *ibid.*
General rules 13
Law strictest when the condition was to be performed to a stranger, or to affect the rights of third parties 16
If condition be, that on repayment, the mortgagee, &c. shall reconvey, a reconveyance necessary on performance of condition 18

CONDITIONAL PURCHASE,

Instances of 28

CONSIGNEE.

Vide BILLS OF LADING.

Mortgagee may charge commission on West India estates as consignee, *semble* 353

Page

CONTRIBUTION.

Vide ASSETS.

In what cases there shall be contribution 506
Where devisee of estate in mortgage shall compel devisee of estate not in mortgage to contribute *ibid.*
Where two devisees of separate estates in mortgage ... 506
Where the estates are freehold and copyhold and descend differently *ibid.*

CONVEYANCER, CERTIFICATED.

Has a lien on papers for costs on that particular account 310

COPYHOLDS.

Not extendible 64. 67
Mortgages of 111
On performance of condition the surrender is at an end *ibid.*
Surrenderor remains tenant until admission of the surrenderee 112
If surrenderee be admitted, a resurrender and admission necessary on payment of mortgage and a new descent cast..... *ibid.*
Lord cannot compel surrenderee to be admitted without a special custom *ibid.*
Where mortgagee has not been admitted, practice ... 113

Page

After admission by mortgagee, the mortgagor may release to him 113
Mortgagee may file his bill to foreclose before admittance 113. 519
Et vide Foreclosure.
Equity of redemption of copyholds may be mortgaged by deed..... 114
If undisposed of, will descend to customary heir *ibid.*
On death of mortgagee after admittance, copyhold will descend on his heir..... *ibid.*
Surrenderee before admittance cannot pass lands by surrender *ibid.*
But may devise them in equity *ibid.*
Devisee (admitted) of a devisee (not admitted) cannot maintain ejectment 115
If covenantee assign, and surrender be made by mortgagor to the assignee, the lord must admit him *ibid.*
If heir of mortgagor be admitted and a heriot paid, and afterwards the mortgagee die and his heir be admitted 116
Surrenderee, after admittance, may lay his demise in ejectment between the surrender and admittance ... *ibid.*
Mortgagor may make second surrender before admittance of first surrenderee to be good in the event 116
Surrender by mortgagee, to use of will before admittance, void *ibid.*
Surrender out of court vacated for want of due presentment 117
Equitable mortgage may be by deposit of copy of court roll 204
Infant trustee or mortgagee will be ordered to surrender 362
Judgment cannot be tacked in respect of copyholds 393. 423

Corporation.

Subject to an equity of redemption 46

Costs.

Mortgagee entitled to all his costs with interest 355. 392. 443
Unless deprived by misconduct 355. 392
May be tacked without mortgagor's concurrence, *semble* 320
Will be allowed on taking account 561
Mortgagor on redemption must pay costs of all claiming under the mortgagee... 392
Costs of taking administration allowed..... *ibid.*
Costs totally irrelevant to the mortgage not allowed *ibid.*
But costs arising from nature

Page

of the reconveyance as fine, &c. will be allowed ... 393
Mortgagor compelled in one instance to pay costs of mortgagee above taxed costs in an action at law, as well as taking out administration .. 536
Mortgagee may in some cases be compelled to pay costs 393

COVENANTS

Entered into with mortgagor do not descend to his heir at law, or pass to an assignee of the mortgagee, but are covenants in gross 348

COUNSEL.

Vide NOTICE.

CREDITORS.

Vide INTEREST *and* TACKING.

Simple contract and specialty must come in alike under a devise for payment of debts 188
Creditors must also comply with the terms of the will, and there can be no sale if the trust be to raise money out of annual rents *ibid.*
Will be restrained from suing executor after a decree to account..... 56
Creditor whose debt subsisted in equity only, permitted to redeem 539
Of husband in respect of term purchased in joint names of husband and wife 541

Page

Creditors allowed to redeem in default of assignees, executors, &c. 537
But must make the parties having the legal right to redeem parties to the bill 552

CROP.

Vide EMBLEMENTS.

CROWN DEBTS.

Equity of redemption subject to 61
Debts of record to the king bind the debtor's land from the time of his becoming indebted 92
The crown has preference in all cases where the debt is prior on record to the judgment, &c. of a subject, although the lands are delivered by the sheriff..... *ibid.*
To give the subject priority, if his judgment be prior, the lands must be delivered *ibid.*
Debts to the king on bond or simple contract formerly became a debt by record only after inquisition 93
Specialty debts to the king now have the effect of a statute staple 94
Whether an extent will overreach an execution on a judgment after goods are seized but before sale...95, *et seq.*
Lands of accountant to the crown bound from time of entry into office 101

Page

Extent tested before inrolment of bargain and sale of bankrupt's estate, effect of 102
Goods of the king's debtor bound from teste of the writ *ibid.*
The assignment by commissioners of bankrupt does not relate to time of bankruptcy as against the crown *ibid.*
If extent be tested subsequently to provisional assignment, it is too late 103
Crown cannot prove under the commission, *semble* ... *ibid.*
Commencement of king's suit what? *ibid.*

CURTESY.

Vide TENANT BY.

DEBT.

Every loan implies a debt ... 24
Qu.? whether creditor could maintain action of debt on Welch mortgage 207, *note.*

DECREE.

Vide FORECLOSURE. REDEMPTION. CREDITORS. EXECUTORS.

After decree to account, executors must not lend money on mortgage..... 192
Decree for foreclosure will sometimes be opened after enrolment..... 515
Will be opened by fraud or collusion of mortgagee 516

Page

Or if mortgagee afterwards proceed on his bond, &c.... 516
Will not be opened for overvalue or after twenty years' possession for mere form... *ibid.*
What other acts by mortgagee will or will not open decree 517
Decree of foreclosure cannot be obtained until forfeiture at law of the estate..... *ibid.*

DEFEASIBLE PURCHASES,

What 28, 29

DEFECTIVE CONVEYANCE.

Vide SHIPS.

Relief in equity in case of 222. 231
Against judgment creditors, *qu.?* 223. 227. 232
And also against second mortgagee with notice of the first defective conveyance, *semble* 227 to 230
Subsequent mortgagee without notice has preference at law and in equity to prior defective assurance... 232
Whether in case of defective security a sale may be obtained 514
Vide *Sale Bill for. Foreclosure.*

DEPOSIT OF TITLE DEEDS.

Equitable mortgage by deposit of title deeds 195
Is evidence of an agreement for a mortgage..... *ibid.*
Prior to this doctrine, posses-

Page

sion of title deeds gave no interest on the lands except collaterally 196
Determination not to extend it beyond its present limits 197
The deposit must not be *diverso intuitu* 198
Will create an equitable mortgage although not a word is spoken 200
May be a security for future advances 201
May be made to the creditor or some third person over whom the debtor has no controul *ibid.*
But not to his wife, nor retained by himself with a memorandum of agreement..... 202
Parol evidence admissible ... *ibid.*
Shall have preference over a subsequent purchaser or mortgagee with notice..... *ibid.*
A legal conveyance made in contemplation of bankruptcy will be protected by a prior deposit 203
The purpose of the deposit may be enlarged without a redelivering *ibid.*
Whether there must be a delivery of all the title deeds *ibid.*
Equitable lien on copyholds by deposit of copy of court roll 204
An affidavit will not be admitted contrary to the

Page

terms of a written agreement, *semble*..... 204
If debtor deny the deposit to be for further advances, court will direct an inquiry 205
Mortgagee will be entitled to his costs on a petition for a sale, if there be a written evidence 206

DESCENT.
Vide HEIR.

Estates descended must exonerate estates devised from mortgage debts 486
Estate devised for payment of debts shall exonerate estates descended..... 487
The above does not apply to estates specifically devised charged with debts *ibid.*

DEVISE.

Mortgage is but a revocation *pro tanto* 46. 58
Of an equity of redemption valid if attended with the technicalities required by law 46
Whether lands in mortgage can be devised at law prior to breach of condition, *qu.?* 47
Devise for payment of debts takes the case out of the statute of fraudulent devises 187
But to take the case out of the statute, the devise should

Page
effectually provide for the debts, *semble*..... 189
Devisee held entitled in a case of mortgagee dying after order *nisi* and before final decree of foreclosure; but estate, personal assets, as to creditors.....531. 591
Devisee of lands in mortgage may call on estates devised or charged for payment of debts for indemnity 485
Estates descended must exonerate estates devised..... 486
Estates devised for payment of debts shall exonerate descended estates..... 487
The above does not apply to estates specifically devised charged with debts *ibid.*
Covenant by devisee on transfer of mortgage will not make the debt his own..... 499
Vide *Payment of Mortgage Money.*
Devisee may redeem 538
Of devises and bequests of mortgages..... 566
Bequest of money on mortgage is within the mortmain act 591
Bequest of principal of mortgage does not carry arrears of interest, and bequest of arrears of mortgage passes the interest only 591
Effect of the word mortgage in the will of mortgagee in fee, considered..... 567

Page
Passes the whole estate in equity 567
Whether it will pass the lands at law, *qu.?* 567, 568
Will be sufficient if testator's intention cannot be ascertained 568
Whether by an express gift of the money, the lands will pass at law 568
Under a general devise of lands, &c. forfeited land in mortgage will not pass beneficially 569
But mortgagee may devise them by a particular description, or point to them by a particular locality, and they will pass beneficially 570
Release prior to devise, presumed, to support devise to a charity *ibid.*
Whether a general devise of lands will pass the legal fee in lands in mortgage, considered 571
General rule is now established that legal fee will pass if the words be sufficiently comprehensive unless intention to the contrary shewn on the face of the will 585
Charge of annuity evidence to the contrary..... 586
General devise of real and personal estate to the same person, charged with debts

Page

and legacies, legal fee will pass, *semble*, but *qu.?* if charged with annuities 586
Mortgage debt to one and general devise of real estate to another..... 587
If in the last case the lands be charged with debts and legacies..... *ibid.*
A general bequest of all the personal estate to one, and all the real estate to another *ibid.*
Present practice to except mortgaged estates out of a general devise *ibid.*
General devise of lands, &c. will pass mortgaged lands if Will be made after foreclosure, or release, or absolute title by length of time 587, 588
If the foreclosure, release, &c. be subsequent to date of will, *secus, sed qu.?* 588, 589, 590
If the will be executed prior to final decree of foreclosure, but after decree to account..... 590

DISSEISIN.

Vide FINE. MORTGAGOR. MORTGAGEE.

If mortgagee be disseised and fine levied, mortgagor has five years to redeem after payment or tender ... 370

Page

DIVIDENDS ON STOCK.

Not apportionable 453
Et vide *Stock*.

DOCKET.

Striking of, made notice by 46 Geo. III. repealed by 49 Geo. III..... 388

DOCKETING.

Vide JUDGMENT.

DOWER.

Wife of mortgagee in fee formerly held entitled to dower 44
Not allowed in a mere equity of redemption 48
Dowress may redeem 540
Levying a fine to let in mortgage 548

DYERS.

Vide LIEN.

Have not a general lien without an express contract 312

EJECTMENT,

Vide EMBLEMENTS. TENANT FROM YEAR TO YEAR.

Mortgagor liable to, without notice 342
Mortgagee may in like manner eject lessee of mortgagor, if lease be subsequent to mortgage 343. 347

Page

Mortgagee bringing ejectment against the tenant and refusing to take out execution 558

ELEGIT.
Vide JUDGMENT.

EMBLEMENTS.

Mortgagor not entitled to ... 343
Nor his lessee, *semble* 344

EQUITABLE MORTGAGE.

General order of 8th March 1794, does not apply to ... 247
Distinction between mortgage of equity of redemption and equitable mortgage *ibid.*

EQUITY.

Where equities are equal, the law will prevail..... 239

EQUITY OF REDEMPTION.
Vide REDEMPTION RIGHT OF.
REDEMPTION BILL FOR.

Opposed by judges of the common law 20
Attempts made to defeat it... 21
No restriction on it valid..... 22
Cannot be confined to a particular class of heirs ... 23
Omission of bond or other collateral security does not affect the right..... 24
Parol evidence admitted to show a conveyance is by way of mortgage..... *ibid.*

Page

Must not be clogged by mortgagee with any bye agreement to give an undue advantage..... 26
Benefit of, extended to creditors 33
Exceptions, in cases of provision intended by mortgagor for some branch of his family or that the mortgage was intended as a marriage settlement 35
Mortgagor cannot under covenant for further assurance be called upon to release the equity of redemption 40
Nature of an equity of redemption 41
Is an estate and not a mere right..... 42
All persons subject to it, but whether the king, *qu.?*..... 46
Descends as the legal estate would *ibid.*
May be devised *ibid.*
Limited in strict settlement 47
Entail of must be barred by common recovery or fine 48
Tenancy by the curtesy in, but not dower *ibid.*
Not extendible..... 53
Is equitable assets 54. 57, 58
May be mortgaged.....60. 238
There may be *possessio fratris* of 60
Whether subject to escheat, *qu.?* 61

Page
Subject to crown debts 61
May be sold under an extent of court of exchequer ... *ibid.*
Of copyholds, may be mortgaged by deed 114
If undisposed of will descend to customary heir *ibid.*
Each mortgagee of equity of redemption has preference according to priority of time 239
But when equities are equal the law will prevail 238
Mortgagee of, postponed to a subsequent legal mortgagee without notice 240
Mortgagee of, bound by further advances made by first mortgagee without notice...241. 246, 247
Mortgagor redeeming the first mortgagee and taking a conveyance lets in dower, judgment, &c. *semble*..... 241
Mortgagor of equity of redemption must give notice of prior mortgages 242
General order of 8th March 1794, applies to 247
Cannot be barred by fine or recovery of mortgagee 370
If release of equity of redemption be set aside, money belongs to the heir, *qu.?* 531
Equity of redemption of wife's lands limited to husband and his heirs, a resulting trust for wife and her heirs 547
But the limitations may be evidence of a different intent 549
And recitals not necessary for such purpose 550
If the mortgage be made under a power, the equity of redemption will result to the old uses unless there is evidence of a contrary intention 551

ESCHEAT.

Whether an equity of redemption is subject to, *qu.?* 61

ESTATE, PERSONAL.
Vide CHATTELS.

ESTATE, REAL.
Vide FREEHOLDS, COPYHOLDS, &c.

EVIDENCE.
Vide PAROL.

EXECUTION.
Vide EXECUTORS. EXTENT. EXTENT IN AID. JUDGMENT. STATUTE. WRIT.

EXECUTORS.

Cannot give preference by confessing judgment after bill filed by creditors 56
Creditors after a decree to account, restrained from proceedings at law against *ibid.*
Mortgages by 177
May dispose of specific legacy 178

Page

May raise money by way of mortgage 179
But it is not a natural way of raising money, and may lead to inquiry..... 180
The deed need not state that the money is wanted for the purposes of the will... 180
Nor need the mortgagee see to its application *ibid.*
Fraud or covin will vitiate the transaction..... 181
In some cases, mortgage supported although it is apparent the money is not to be applied to the purposes of the will..... *ibid.*
Bona testatoris cannot be taken in execution by the creditor of the executor...182. 185
Assignments of testator's assets made by executor in satisfaction of his private debt not to be supported ...182, 183
But relief will be refused if there has been great delay 184
Mortgagee may take an assignment from an executor (who is also specific legatee) in satisfaction of executor's debts when 185
If a particular fund be appointed for payment of debts, mortgagee should inquire if the fund has been exhausted *ibid.*
After a decree to account, executors must not lend money on mortgage 192

Page

Executors responsible for mortgage contrary to their trust or in disobedience of order of court..... *ibid.*
If mortgage be made to two or more persons in joint tenancy, they are in equity tenants in common, and the executors of deceased necessary parties to a discharge 193
How to be avoided 194
Executor purchasing in incumbrances 321, 322
Administration granted during minority of 360
If one of the executors of the mortgagee be the mortgor, court will order a sale 512
Receipt of one of several executors before probate, sufficient discharge 533

EXEMPTION.

Vide PAYMENT OF MORTGAGE MONEY.

EXONERATION.

Vide DESCENT. DEVISE. HEIR. PAYMENT OF MORTGAGE MONEY.

EXTENT.

Equity of redemption not extendible 53
Under an extent of Court of Exchequer, equity of redemption may be sold... 61

Page

EXTENT IN AID.

How restrained 103

FACTOR.

May sell but cannot pledge goods 269
So as to bills of lading..... 274
Possession of goods by, not within 21 Jac. I. 268

FEMME COVERT.
Vide HUSBAND AND WIFE.

FEOFFMENT.
Vide INFANT.

FEUDS.

Introduction of Norman feuds 5
Tenant could not transfer without his lord's consent, nor *vice versâ* *ibid.*
Tenant could not subject his lands to execution for his debts..... *ibid.*
Nor, if gained by descent, alien without consent of next collateral heir *ibid.*

FINE.

Must be levied or recovery suffered of equity of redemption to bar entail ... 48
By mortgagor does not bar mortgagee..... 348. 356
Actual entry by mortgagee not necessary to avoid it... 356
By mortgagor tenant in tail, lets in mortgage 348

Page

Infant trustee or mortgagee will be ordered to convey by 362
By mortgagee does not bar equity of redemption 370
If mortgagee be disseised and a fine levied, mortgagor on payment or tender will have five years to redeem..... *ibid.*

FIXTURES.

Vide BANKRUPT.

FORECLOSURE.

Mortgagee of copyholds may file his bill before admittance 113. 519
Of foreclosure 510
Usual course to be pursued... 511
In Ireland a sale is prayed ... *ibid.*
In what cases in England, *viz.* 512
Of dry reversion *ibid.*
Infant heir..... *ibid.*
Bill taken *pro confesso*..... *ibid.*
One of the executors of mortgagee being also mortgagor..... *ibid.*
Heir and executor of mortgagor the same person, and admitting deficiency of personal assets..... *ibid.*
Qu.? Whether in every case of a deficient security, when the heir and executors are before the court 512, 513
Time for payment of the money may be enlarged on application 514

Page
But not if bill for redemption be dismissed for want of due payment 515
Decree will be opened in certain cases on application by mortgagor *ibid.*
In what cases decree will not be opened 516
Et vide *Decree.*
What act of mortgagee will open decree *ibid.*
Cannot be obtained until estate is forfeited at law ... 517
A default of half year's interest sufficient..... 518
Will be refused in case of fraud 517
Mortgagee's title cannot be investigated in the course of it *ibid.*
If mortgagee proceed on legal securities he opens foreclosure 518
May proceed to sell stock without decree..... 519
Who are proper parties to the bill..... *ibid.*
Executor of mortgagee *ibid.*
But decree obtained without him by the heir, binding on mortgagor..... 520
And the heir may pay the debt to the executor, *semble ibid.*
Original mortgagee where there is a derivative mortgage..... *ibid.*
Joint tenants of an entire thing..... *ibid.*
Trustee of legal estate..... *ibid.*

Page
Heir of mortgagee (if legal estate has descended on him) 521
Mortgagor or his heir..... *ibid.*
Tenant in tail in reversion expectant on estate for life ... 522
All incumbrances prior to the bill 525
Who not necessary parties, *viz.*
Heir of mortgagee if estate be devised away 521
Executor of mortgagor *ibid.*
Except in case of bill for sale *ibid.*
Subsequent remainder-man or reversioner after first tenant in tail 522
Et vide *Tenant in Tail.*
Incumbrancers and assignees of equity of redemption subsequent to filing the bill 523
Et vide *Lis pendens.*
May be obtained against an infant 524
Et vide *Infant.*
Against husband and wife ... 526
Et vide *Husband and Wife.*
Final order absolutely necessary 527
A release by mortgagor tant-amount to..... 528
Computation of time by calendar months *ibid.*
If foreclosure be opened, after death of mortgagee, money belongs to the heir, *qu.?* 531
Lands foreclosed by two or more are held in tenancy in common 533

Page

FRAUD.

Right of priority may be lost by 426
What will amount to fraud:
False information..... *ibid.*
Concealment 427
Whether being witness to first mortgage, *qu.?* ...389. 427
Vide *Witness.*
Permitting mortgagor to retain title deeds is *primâ facie* evidence of fraud 428

FRAUDULENT CONVEYANCE.

Statute of 13 Eliz. cap. 5. prohibiting 260
Not every feoffment or judgment delaying creditors, fraudulent 261
Must be of malice or fraud... *ibid.*
Retention of possession of chattels personal by debtor *primâ facie* proof of 262
May be rebutted by shewing the possession consistent with the transaction..... 263
If delivery be impossible..... *ibid.*
As of ships at sea *ibid.*
Goods at sea or *in transitu*... *ibid.*
Choses in action *ibid.*
Goods in warehouse..... 264
When delivery is refused..... 264
Possession consistent, as of goods settled on marriage, &c. *ibid.*
Assignment on condition to be performed by vendee... 265

Page

FRAUDULENT DEVISES.

Prior to statute of fraudulent devises, devisee not subject to specialties, and if heir aliened, creditor without remedy at law..... 396
Effect of statute 3 William and Mary to make devisee liable as the heir and subject both to account at law *ibid.*
Statute does not apply to devises for payment of debts *ibid.*
No tacking of bond debt against devisee for payment of debt..... 398

FREEHOLDS.

Mortgages of freeholds 106
Mortgage by way of absolute conveyance with separate deed of defeazance discountenanced 107
Former mode by demise and redemise *ibid.*
Might be still advantageously resorted to when 108
Court will restrain executor of mortgagee from proceeding at law on the bond if the concurrence of the heir of mortgagee cannot be obtained in a reconveyance 109
Mode of mortgage to two persons giving each a pri-

Page

ority on a moiety and a charge on the other moiety 110

FREIGHT.

Whether a mortgagee out of possession can maintain action for freight, *qu.?* 296
Freight in a charter party may be assigned independent of the ship, and is not within the registry act, *semble*..... 297
Otherwise the earnings cannot be separated from the ship, *semble* *ibid.*
Equity will grant injunction to prevent payment to mortgagor 298

FURTHER ADVANCE.

Vide DEPOSIT, TACKING.

If mortgage be to cover further advances, and second mortgagee advance money with notice, and afterwards first mortgagee make further advances with notice, *qu.* if he may not tack?... 429
Interest converted into principal is a further advance and cannot be tacked against mesne incumbrancers with notice..... 439

FURTHER ASSURANCE.

Vide BANKRUPT. DEFECTIVE CONVEYANCE. TENANT IN TAIL.

Mortgagor cannot under covenant for further assurance be called to release the equity of redemption 40
Relief in equity against assignees of bankrupt if a covenant for further assurance 217. 222

GAVELKIND.

Vide HEIR.

GLEBE LANDS.

Not extendible..... 67

GUARDIAN.

Vide INTEREST.

Purchasing in incumbrances 321, 322
May redeem for benefit of infant and apply rents for such purpose 541
Must keep down interest of mortgage 447

HEIR.

Heirs by gavelkind tenure, or custom of borough English, entitled to equity of redemption 46
Purchasing in incumbrances 321, 322
Of mortgagee is a trustee for the personal representative 532
But if he redeem he may pay off the mortgage and retain the estate, *semble* 520. 532
Covenant on transfer of mort-

Page
gage will not make the debt his own..... 499
Vide *Payment of Mortgage Money.*
May redeem..... 538
Protestant heir..... 541

HUSBAND AND WIFE.
Vide NOTICE. TENANT BY CURTESY.

Lands held *jure uxoris* extendible 67
Stock in the name of the wife not reduced into possession by husband will survive to wife 299
Husband of femme tenant in tail getting in incumbrances is not entitled to interest during the period of his possession 447
Decree of foreclosure against, in respect of wife's lands absolutely binding and no day allowed 527
If femme covert be mortgagee in fee her husband will be entitled to the land as her administrator..... 532
Money raised on wife's estate for benefit of husband, wife will be a creditor 502, *et seq.*
She will have preference to legatees but not to creditors 503
Parol evidence admissible to shew for whose benefit raised *ibid.*
Exception to general rule if money raised to pay off wife's debts 503
Parol evidence of relinquishment of claim by wife after husband's death 504
Claim not waived by wife's covenant to pay after husband's death *ibid.*
Course to be pursued if money be intended as a gift for husband 505
Husband may reduce mortgage into possession during joint lives 533
May alone surrender or assign a mortgage term with or without consideration 533, 534
If it be in fee a conveyance and fine necessary 533
Qu.? If equity will compel wife to join in a conveyance without a settlement 534
Or if husband become bankrupt 534
If he die before conveyance, *qu.?* if she may not recover against assignees from him *ibid.*
If husband survive, he is entitled as administrator, and the wife's heir is a trustee for him..... *ibid.*
Mortgage of wife's lands and equity of redemption limited to husband and his heir a resulting trust for the wife and her heir..... 547
If she concur in a fine of

Page

her jointure lands or of lands on which she has right of dower to let in mortgage 547, 548
But the nature of the limitations may be evidence of a different intent..... 549
And recitals not necessary for such purpose 550

JEWS.

Jewish mortgage, nature of... 3
Jewish laws against usury ... 5

IMPROVEMENTS.

Mortgagee in possession will be allowed charge of permanent improvements, with interest 354. 320
Must be a special order for the allowance of 556

INFANT.

Infant trustees and mortgagees may convey by the statute 7 Anne c. 19. 357
Ordered to convey in the West Indies, Calcutta, Ireland 361
What conveyance by infant is voidable, or void ... 359, 360
Infant executor, administration granted during minority under 38 Geo. III. cap. 87..... 360
Infant trustee or mortgagee will be ordered to convey by common recovery, fine, or surrender..... 362

Page

Interest will not be converted into principal against infant mortgagor, unless he is plaintiff, or time is given for his benefit 443
In case of an infant mortgagor, court will order a sale instead of foreclosure 512
A day must be given him if he is to join 526
But mortgagee may insist on foreclosure 524
In some instances refused ... 517
And if granted infant will have a day when he comes of age 524
Need not wait until that time *ibid.*
Usual mode of proceeding against him.. *ibid.*
May put in a new answer on shewing cause 525
Cannot go into the account or redeem, but must error in decree *ibid.*
Subpœna must be served on him when of age..... *ibid.*
Vide *Subpœna.*
Infant plaintiff bringing his bill to redeem, and making default in payment, *qu.?* if absolutely debarred..... 526

INROLLMENT.

Vide BARGAIN AND SALE.

INTEREST.

Portions to be raised out of

Page
annual profits will not carry interest 176
A general charge of debts on real estates will not give interest on simple contract debts not carrying interest 189
(Contra if the charge be of simple contract debts of a third person) 189. n.
Nor liquidation in the master's office 189
Nor delay arising out of the jurisdiction of the court, or which might have been prevented by the party *ibid.*
But court may give interest 190
And may direct a mortgage carrying interest 190. 192
If mortgagee pray a sale in case of bankruptcy, and prove for residue, he cannot charge interest beyond date of commission 505
Mortgagor not bound by agreement between mortgagee and assignee to convert interest into principal 319
Exception to the rule 444
Nor can interest (with notice) be tacked to prejudice intermediate creditor ... 319. 439
Legal interest what 432
Law relaxed by 14 Geo. III. in favor of mortgages in the West Indies and Ireland, and assignments thereof executed in Great Britain so as not to exceed 6*l. per cent.* 432

Page
Explained by 1 and 2 Geo. IV. 435
Agreement at time of mortgage, for converting interest into principal from time to time as it becomes due, void 438
When it has become due it may be converted into principal *ibid.*
What is sufficient evidence of intention by mortgagor to convert interest into principal..... 439
An account stated, is not ... *ibid.*
Must be declared in writing *ibid.*
Mortgage duty must be paid on it..... 440
Mortgage debt composed of principal and arrears of interest and interest on that interest, *qu.?* if usurious... *ibid.*
Equity will in certain cases direct interest to be paid on interest 441
General principle attempted to be introduced that so much of the interest as was ascertained by the deed should carry interest *ibid.*
Interest on interest will not in general be allowed 442
Interest will carry interest after master's report has been confirmed, and will be computed from the time of confirming the report *ibid.*

Page
But not to prejudice intervening incumbrances 443
Nor against infant mortgagor unless plaintiff in suit *ibid.*
Unless further time is given for his benefit *ibid.*
Interest on interest allowed if the court give time to redeem..... 444
Tenant for life must keep down interest during his life 445
But not bound to liquidate prior arrears in favor of remainder man *ibid.*
Excepted cases 446
Et vide *Tenant for Life.*
Tenant in tail cannot be compelled to keep down interest *ibid.*
But guardian must in case of infancy of tenant in tail... 447
Et vide *Tenant in Tail.*
And so of tenant in fee *ibid.*
Difference between agreement that interest shall be raised if not punctually paid, and that it shall abate on punctual payment..... 448
Further distinction if the consideration for the increased rate be forbearance by creditor 449
Agreement for abatement of interest is not in the nature of condition to be defeated by a simple breach of it... *ibid.*
To stop payment of interest

Page
in mortgage six calendar months' notice and strict tender necessary 450
Mortgagor should be ready to make oath his money has been ready, and no profit made, *qu.?*..... *ibid.*
And mortgagee must have time to advise on deed of re-assignment 451
Tender will not stop interest if right to redemption be in dispute..... 452
Tender to executors who have not proved sufficient 453
Qu.? if tender be made in bank notes..... *ibid.*
Must be made by one interested in the estate *ibid.*
Is payable de die in diem, and must be apportioned *ibid.*
Secus, dividends of stock..... *ibid.*
Bond debt also secured by mortgage may go beyond the penalty 456
Devisee of mortgaged estate not entitled to set off an arrear of interest due at death of mortgagor against arrears of interest due on a legacy given by mortgagee to mortgagor for life, and not received by mortgagor 454
Breach of condition in bond by non payment of interest, entitles mortgagee to prove under commission of bankruptcy for the whole debt 506

Page

Default in half-year's interest sufficient breach of condition to authorize foreclosure 518
Bequest of principal of mortgage will not pass the arrears of interest 591
Bequest of arrears of mortgage will pass the interest only *ibid.*

INTERESSE SUO.

Vide RECEIVER.

JOINT TENANCY.

Vide EXECUTORS, FORECLOSURE, MORTGAGE, TENANTS IN COMMON.

JOINTRESS.

May redeem..... 540
Levying fine to let in mortgage 547
Et vide *Fine.*

INNS OF COURT.

Vide CHAMBERS.

IRELAND.

Usual in Ireland to pray a sale instead of a foreclosure ... 511

JUDGMENT.

Trust estates of inheritance extendible under..... 51
But not, if of chattel interest 52
Nor of an equity of redemption 53
But is a lien in equity..... 55
At common law, lands could not have been taken in exetion for debt 5. 62
Under a judgment recovered

Page

or acknowledged, how extent to be executed...63, 64, 65
No difference between a judgment recovered and acknowledged 65
May be entered up *instanter* under warrant of attorney 64
In what manner lands are to be extended..... 65
Sheriff delivers legal possession only 66
The creditor may have a moiety of the rent and reversion *ibid.*
Of a creditor having two judgments 67
If a moiety be already in execution *ibid.*
Of the writ *ad computandum* 66
Scire facias ad rehabendam terram 67
Copyholds not extendible 64. 67
Nor advowson in gross, *semble* 67
Nor glebe lands *ibid.*
Secus rent charge *ibid.*
Lands *jure uxoris*..... *ibid.*
Ancient demesne..... *ibid.*
Of judgment against tenant in tail 68
Against one of two joint tenants *ibid.*
Is a general lien *ibid.*
Binds after purchased lands *ibid.*
Purchaser may protect himself against, by prior legal estate..... *ibid.*
At common law, relates to the first day of Term *ibid.*

Page
To what time it now refers... 69
Must be docketed *ibid.*
If not docketed, binds with notice *ibid.*
Judgment entered before Essoign Day refers to preceding Term..... 69, 70
Binds chattels from delivery of writ of execution to sheriff 70
Judgment after contract for sale and payment of money, but before conveyance, relieved against the equity *ibid.*
Whether judgment binds a purchaser with notice who before execution obtains a conveyance from trustee 71, 72
Equity will accelerate the payment of Debt by sale of extended moiety 73
Inquisition by sheriff may be vacated for defect *ibid.*
Sheriff may extend a term of years, or sell it to the creditor *ibid.*
If judgment reversed the sale void *ibid.*
Secus if by writ of *fi. fa.*..... 74
After delivery of lands to creditor, he cannot have *fi. fa.* or *capias ad satisfaciendum* ibid.
Except the sheriff return *nihil* *ibid.*
After *fi. fa.*, creditor may have *capias* or *elegit* *ibid*
May have *scire facias* if evicted..... *ibid.*

Page
Creditor holds the land as freehold, but it is transmissible to his personal representatives 75
Execution cannot be sued out after a year and a day, without *scire facias*..... *ibid.*
Unless creditor agree to waive the benefit *ibid.*
Executor or administrator must sue out *scire facias* even within the year *ibid.*
Writ of execution may be continued by entry on roll *ibid.*
Qu.? whether merely awarding the writ will warrant the continuances *ibid.*
Several writs for several counties for the whole debt ... *ibid.*
Modes of discharging a judgment..... *ibid.*
Presumed to be satisfied after twenty years 76
Debtor may plead payment of an old judgment under the 4th of Anne *ibid.*
Judgment creditor relieved against in case of a defective conveyance, *semble* 223. 227
Docketing of, not notice ... 388
Notice of undocketed judgment binds *ibid.*
Judgment forms a general lien, but does not give an estate in the land 393, 422
Difference in this respect from a mortgage *ibid.*
May be tacked by mortgagee 393

Page

Except in respect of copyhold..... 393. 423
Statute of 21 Jac. declaring that judgment creditors not having taken out execution at time of bankruptcy shall come in for a rateable part only does not prevent tacking 394
Advantage to be obtained from getting in a precedent judgment explained..... ... 415
Difference in this respect between judgment and statute 416
Judgment creditor shall not tack so as to gain preference 421
Satisfied judgment may be used by mortgagee for his protection 430
Judgment creditors may redeem 539

THE KING.

Whether subject to an equity of redemption 45
The king, or his grantee, may redeem 539

LAND.

Could not at common law have been taken in execution for debt.....5. 62
But only the growing profits by writ of *levari facias* ... 62

LEASE.

By mortgagor not valid against mortgagee 343
Mortgagee may annul or confirm 347

Page

Lease by mortgagee not binding on mortgagor, except in case of necessity 366
Covenants entered into with mortgagor, effect of..... 348
Renewed lease subject to subsisting equity of redemption 127. 370
Mortgagee not bound to renew 127
Mortgagee cannot accept a valid lease from mortgagor 364

LEASEHOLDS.

Vide LEASE, RENEWAL.

Mortgages of 118
Generally made by way of underlease *ibid.*
Mortgagee after assignment liable to covenants before entry 118 to 126
Renewed lease will be subject to the equity of redemption 127. 370
Mortgagee not bound to renew 217
In mortgage of renewable leases, covenant should be introduced that mortgagor will bear the expense of renewal *ibid.*

LEGACY.

Vide SPECIFIC LEGACY, LEGATEE.

LEGAL ESTATE.

Incumbrancer without notice obtaining legal estate gains preference..... 409. 423

LEGATEE.

General rule that personal es-

Page
tate of mortgagor shall indemnify the real estate, shall not prejudice legatee 483

LESSEE.

Vide LEASE, LEASEHOLDS, NOTICE.

Of mortgagor liable to eviction by mortgagee 343
Is not entitled to emblements *semble* 344
Not liable to an action for mesne profits 345
May redeem 347. 540

LIABILITY.

Vide PAYMENT OF MORTGAGE MONEY.

LIEN.

Vide ASSETS, MARSHALLING.

Vendor conveying without receipt of purchase-money has a lien 248
So vendee paying all or part of purchase money, if contract broken off *ibid.*
This lien may be rebutted by evidence of contrary intention 249
What is sufficient evidence... *ibid.*
Mere personal security is not *ibid.*
Depends on the circumstance of each case 250
Qu.? whether mortgage for all or part of the purchase-money is sufficient 251
Does not extend to estate sold in consideration of an annuity, *semble* 252
Qu.? whether the lien gives

Page
preference over subsequent equitable incumbrancer with deposit of title deeds 252
Does not apply to personal estate 259
After delivery of part of goods, no stoppage of remainder *ibid.*
Of liens in general 310
May subsist both at law and in equity *ibid.*
Are general or specific *ibid.*
Lien on specific articles for labour done *ibid.*
Not extending to general balances or different accounts *ibid.*
Lien for general balance..... 311
By express contract..... *ibid.*
By implication from usage of trade..... *ibid.*
From manner of dealing between the parties..... 312
As to factors..... *ibid.*
— solicitors..... *ibid.*
To create a lien, goods must come into actual possession 313
And does not extend beyond actual possession..... *ibid.*
Delivery of part only destroys the lien 314
A specific security destroys lien *ibid.*
All sums forming a lien, specific or general, may be tacked 393

LIS PENDENS.

Is notice 388
Third mortgage may tack

Page
first mortgage bought in *pendente lite* 418
But not after a decree to settle priorities..... 420
Purchaser *pendente lite* bound by dismissal of bill for redemption for want of payment of mortgage-money 515
Incumbrancers subsequent to bill of foreclosure, are bound by *lis pendens* 523
Although the suit afterwards abate and be revived *ibid.*
And even if incumbrance be made during the abatement of suit *ibid.*

LONDON.

General rule that personal estate of mortgagor shall indemnify the real estate, applies as against the orphanage part by the custom of London 483
Mortgage in fee divisible according to the custom of... 532

LORD.

Taking by escheat bound by equity of Redemption 43

LUNATIC.

Lunatic trustee or mortgagee may convey by himself or committee 362
Commission must be previously issued, or he must have been found lunatic by competent jurisdiction abroad 363
Committee may redeem 541

MAINTENANCE.

In case maintenance is to commence notwithstanding the life estate, and the payment of it is confined to be out of the annual profits, it must run in arrear, and be paid when the trust term falls into possession..... 164
Where the trust is to raise maintenance by sale or mortgage *ibid.*
In what case the words "rents and profits" will authorize a mortgage, or be confined to annual rents..... 167

MARSHALLING.

Vide ASSETS.

MESNE PROFITS.

Lessee of mortgagor not liable to action for, *semble* 345

MINES.

Mortgagee will not be allowed costs for opening... 561

MORTGAGE.

Defined a debt by specialty 1. 457
Qu.? if there be neither covenant or bond 509
Jewish mortgage 3
Greeks and Romans, known to 3
Anglo-Saxons, *qu.?* if known to 4

Page
Norman conquest, suspended at 5
Vivum vadium and *mortuum vadium* explained 8
Mortgage an estate on condition 10 *et seq.*
Once a mortgage, always a mortgage 22
Cannot be irredeemable *ibid.*
Mortgage creditor not entitled to any advantage beyond principal, interest, and costs 24
Mortgage must be mutual 24. 33
But need not run *quatuor pedibus*. One may be able to redeem at a time when the other may not be able to enforce payment..... 34
Whether absolute conveyance can be converted into a mortgage by agreement subsequent *semble* not 38
Of freeholds 106
Et vide *Freeholds.*
Of copyholds 111
Et vide *Copyholds.*
Of leaseholds 118
Et vide *Leaseholds.*
With powers of sale..... 128
Et vide *Sale Power of.*
Under trust terms 136
Et vide *Portions, Maintenance, Interest.*
By executors, trustees for sale and for payment of debts, and under powers of charging 177
Et vide *those titles.*

Page
By deposit of title deeds..... 195
Et vide *Deposit.*
Of Welch Mortgages 207
Et vide *Welch Mortgages.*
By tenants in tail, and by defective conveyance 213
Et vide *those titles.*
Of advowsons, church livings, rectories impropriate, and tythes 233
Et vide *those titles.*
Of the equity of redemption 238
Et vide *Equity of Redemption.*
Equitable lien on landed estate 248
Et vide *Lien.*
Of chattels personal..... 260
Et vide *Chattels.*
Of bills of lading..... 270
Et vide *Bills of Lading.*
Of ships and freight..... 276
Et vide *Ships and Freight.*
Of stock 299
Et vide *Stock.*
Liens in general 310
Et vide *Lien.*
Of assignments of mortgage 315
Et vide *Assigments.*
Mortgage by absolute conveyance with separate defeazance 106
Out of what fund mortgage must be paid 457
Et vide *Payment of Mortgage Money.*
To whom money and lands in mortgage will belong 529
So long as the debt remains the principal, and the land

Page
the pledge, it is personal assets 529
And heir or devisee of mortgagee will be trustee for the executor 529
Mortgagee may convert it into land, and make it pass as such 530
If mortgagee obtain an absolute decree of foreclosure or a release, the lands cease to be a pledge, and become the real estate of mortgagee 531
Qu.? if foreclosure be opened or release set aside *ibid.*
Mortgagee dying after order *nisi*, but before final order, devisee entitled; but land is personal assets, as to creditors *ibid.*
The land in mortgage belongs to the executor, although the heir obtains a release, or it becomes irredeemable from lapse of time *ibid.*
But if heir foreclose, it seems he may pay off the mortgage to executor, and retain the estate 520. 532
Et vide *Heir.*
If feme covert be mortgagee in fee, her husband will be entitled to the land as her administrator..... 532
Et vide *Husband and Wife.*

Page
Mortgage in fee is divisible by the custom of London 532
Et vide *London.*
If two or more jointly advance money on mortgage the debt will survive at law but not in equity, and personal representative of deceased a neeessary party... *ibid.*
Course to be pursued in case of loan by trustees *ibid.*
So if lands be foreclosed by two or more, they will be tenants in common 533

MORTGAGEE.

Must not enter into a contract at the time of the loan for the purchase of the fee at a given sum in default of payment of mortgage-money 27
If two or more lend money on mortgage, they are tenants in common, although the security is limited in joint tenancy 193
Consequences of this doctrine if one die before mortgage is paid off..... *ibid.*
Proviso for avoiding it..... 194
Mortgagee in possession accountable for profits 320
If he assign without mortgagor's assent, responsible for assignee 320. 368

Page
In what manner he is to account 355
Et vide *Account.*
Court of Equity never interferes to prevent mortgagee obtaining possession ...330. 351
May annul or confirm lease by mortgagor 347
Privileges annexed to estate of mortgagee 351
May evict mortgagor or his lessee without notice *ibid.*
Et vide *Emblements, Mesne Profits, Lessee.*
May give the tenant notice to pay him the rent due and distrain for it *ibid.*
May proceed at law and in equity at the same time ... 352
Best course to pursue 518
Cannot compel mortgagor to pay debt on bond, unless mortgagee is in a condition to reconvey the estate 352
May retain out of the profits all necessary expenses in collection of rents 353
May stipulate for appointment of receiver *ibid.*
If property be dispersed, may appoint receiver *ibid.*
Cannot charge for personal trouble *ibid.*
Or appoint himself receiver 356. 366
Of West India estate cannot charge commission 353. 367

Page
But may charge commission as consignee..... 353. 367
Duty of mortgagee in possession to keep mortgaged premises in necessary repairs 353
Will be allowed the charge of permanent improvements with interest..... 354
Expenses of renewal and maintaining title *ibid.*
May pull down ruinous houses and rebuild *ibid.*
May fell timber if security be defective *ibid.*
Is not bound to lay out money, except for necessary repairs *ibid.*
Cannot compel mortgagor to advance money for renewal without an agreement..... *ibid.*
In possession for seven years, may be qualified to sit in Parliament 354. 368
In possession may gain a settlement under the poor law... 354
In possession may vote for Member of Parliament 354. 367
Is not estopped denying his mortgagor's title 355
Is a purchaser *pro tanto*, within 27 Eliz. c. 4. *ibid.*
Cannot be compelled by a purchaser to quit possession without payment of principal, interest, and costs *ibid.*
Is entitled to full costs on re-

Page
demption, unless deprived by misconduct..... 355
Infant may convey 357
Lunatic 362
Restrictions and disabilities annexed to estate of..... 364
Cannot accept a lease from mortgagor, *semble* *ibid.*
Cannot by himself make a binding lease in equity, unless there be an absolute necessity 366
Cannot bar right of redemption by fine or recovery ... 370
Shall not present if advowson be vacant *ibid.*
Must not commit waste 371
Must take subject to acts of forfeiture by mortgagor ... *ibid.*
Cannot compel mortgagor to account for rents and profits 332. 334. 372
May compel sale in case of bankruptcy and prove for residue, or throw up his securities and prove the whole debt 505
If mortgagee act *malâ fide*, he will be personally responsible 557
As if he permit bankrupt mortgagor to make use of incumbrance to keep out assignees 558
Or enter and permit the mortgagor to receive the rents..... *ibid.*
Page
Or bring ejectment and refuse to take out execution 559
Or if on sale he permit mortgagor to receive part of purchase money 558

MORTGAGOR.

Bound to see to the application of trust money..... 193
Making mortgages without notice of prior charges, penalty of..... 242
Exception, if other lands are added, not fraudulently 245
Mortgagor must give notice in writing under his hand of all his charges..... 246
Assignee of the second mortgage has the benefit of the penalty *ibid.*
Not bound by settlement of accounts between mortgagee and assignee 319
Nor by their agreement to convert interest into principal..... *ibid.*
Tenant to the mortgagee..... 327
Under proviso for quiet enjoyment until default in payment, may be considered as tenant for years... 328
After determination of agreement and until payment of interest, may be considered tenant by sufferance *ibid.*
If no agreement for possession, is tenant at will, *ibid.*

Page

If mortgage be transferred, he is tenant by sufferance to the assignee until payment of interest, and then tenant at will 329
Heir or devisee of mortgagor holds adversely until payment of interest. &c. and then as tenant at will *ibid.*
If land be in occupation of tenant, mortgagor may be considered as receiver, *sed dub.* *ibid.*
Privileges of..... 331
In possession may vote for Member of Parliament ... *ibid.*
May gain a settlement under the poor laws *ibid.*
Not being in possession by fraud or wrong 332
Is not accountable for rents and profits...332. 334. 372. 555
May present to advowson 60. 233. 341. 370
May stay proceedings at law, or in equity under 7 Geo. II. 335
If mortgagor contract to sell to mortgagee, a court of law will not stay proceedings under the 7th Geo. II. 339
If foreclosure bill embrace any object distinct from the foreclosure, no reference in equity under the statute, *semble* 338
Application to equity must be made prior to mortgagee's being entitled to sue out execution *ibid.*
Proceeds on admission that principal and interest are due as stated in the bill ... 339
Cannot be granted if mortgagor be in contempt 338
Restrictions and disabilities annexed to estate of 342
Will be restricted from waste *ibid.*
In order to enforce specific performance of agreement for a lease, must obtain a reconveyance, or procure the mortgagee to concur... 345
Whether under an agreement for a lease, tenant can compel mortgagor to redeem... 346
Mortgagor cannot dispute his mortgagee's title 347
Cannot bar mortgagee by fine or recovery 348
Fine or recovery by mortgagor tenant in tail, will let in mortgage *ibid.*
Covenants with mortgagor by lessee, effect of..... *ibid.*
Cannot be compelled to pay debt on bond, unless mortgagee is in a condition to reconvey the estate 352
Is liable to eviction without notice 342
Has no right to emblements 343

MORTMAIN ACT.

A bequest of money secured

Page
on mortgage is within the mortmain act 591

MORTGUM VADIUM.

According to Glanville, what 6. 8. 10
According to Littleton, Coke 9, 10

NOTICE.

Vide INTEREST. COSTS. TACKING.

Undocketed judgment with notice binding 69
Mortgagee in fee purchasing without notice of subsequent judgments not bound 71
Second mortgagee with notice of prior defective conveyance relieved against, *semble* 227 to 250
Second mortgagee without notice has preference at law and in equity over prior defective assurance... 232
Notice of a prior equitable charge before conveyance will bind vendee although after payment of purchase-money 239
Third mortgagee without notice gaining the legal estate has preference to prior mortgagee 240
Qu.? How far notice to first mortgagee shall affect his assignee *ibid.*
Notice of assignment should be given to mortgagor..... 319
Notice is expressed or implied 373
Or by statutory enactment... *ibid.*

Page
Want of notice either in grantor or grantee will protect 374, 375, 376
Fraud in the original transaction will be purged by want of notice..... 377
What is not express notice... 378
Constructive notice whatever is sufficient to put a party on inquiry *ibid.*
Notice that the legal estate is in a third person, is notice of the nature of the trust *ibid.*
Notice of the estate being in tenancy is notice of the nature of the interest of the tenant..... *ibid.*
Purchaser or mortgagee will be deemed to have notice of a contract by tenant for purchase of inheritance ... 379
Or of his right to timber..... *ibid.*
Notice that title-deeds are in possession of a third person, puts a purchaser on inquiry of the nature of the lien *ibid.*
Improvident lease of charity is not notice to a sub-lessee *ibid.*
Notice to counsel, attorney, or agent, is notice to party himself:..... *ibid.*
Although employed in part only of the transaction ... 381
But notice must be in *re gestâ* 380
Notice of a deed is notice of its contents, and party

Page
bound by notice if he cannot make out his title without the deed 381
Distinctions taken in the above doctrine *ibid.*
Purchaser from husband of wife's estate, bound to inquire if the husband's contract (the consideration for it) has been performed ... 383
Appointment by father to son and conveyance by father and son to purchaser, is not notice of fraud to purchaser *ibid.*
Registration is not notice ... *ibid*
Registered deed does not prevail under unregistered deed with notice 387
Act of bankruptcy is not notice 388
Docketing of judgment, not notice *ibid.*
Notice of undocketed judgment, binding in equity... *ibid.*
Decree not constructive notice, unless *pendente lite* ... *ibid.*
Being a witness to a deed is not, *semble* 389. 427
Mortgagee obtaining legal estate, not bound by intermediate incumbrances of which he had not notice at the completion of mortgage 390
But notice at any time prior to completion of mortgage is notice, although after payment of money *ibid.*

Page
Mortgagee without notice purchasing in a prior incumbrance, shall tack although purchasing with notice of mesne incumbrance 409
And although *pendente lite* ... 417
But not after a decree to settle priorities 420, 421
Or if mortgagee purchase as trustee for another 413
Mortgagee without notice, and having the legal estate entitled to tack all sums forming special and general liens 393. 423
Notice must be denied whether charged by the bill or not 429
Qu.? if notice to first mortgagee, his security extending to further advances, of second mortgage made with notice of first, prevents tacking..... *ibid.*
Act of bankruptcy prior to lending, does not prevent tacking..... *ibid.*
If loan be subsequently to commission, *qu.?*..... 430
Six calendar months' notice requisite to stop interest on mortgage 450
Mortgagor must give the like notice of his intention to pay in unless mortgagee has demanded it 553
Qu.? if six months' interest in advance be not usury ... 554

Page

Whether mortgagee in possession, permitting mortgagor to receive the rents, be responsible before notice of other incumbrances, *qu.?* 558

NOTICE TO QUIT.

Mortgagor not entitled to, nor his lessee 342, 343
Vide *Mortgagor, Lessee.*

PACKERS.
Vide LIEN.

Have a general lien by usage 311

PARAPHERNALIA.

General rule that personal estate of mortgagor shall indemnify the real estate, shall not prejudice widow's right to paraphernalia ... 483

PARLIAMENT.

Mortgagor in possession may vote for members of 331
Mortgagee in possession for seven years, may be qualified to sit in parliament 354. 368
Mortgagee in possession may vote for members of parliament 354. 367

PAROL EVIDENCE.

Admitted to shew a conveyance is by way of mortgage 24, 25, 26
Parol evidence admissible to shew for whose benefit money was raised on mortgage of wife's estate 503
And of her relinquishment of claim, after husband's death 504

PARTNERS.

One partner may mortgage his share to the other 267
Undivided share of stock mortgaged to a stranger... *ibid.*
Partners seised *per my et per tout,* and each must be allowed against the other all he has advanced 267 n.

PAYMENT OF MORTGAGE MONEY.

One party may be entitled to redeem, although the other party may not be entitled to require payment 34
Out of what fund, mortgage-money must be paid 457
As between real and personal representatives of the debtor, the personal estate primarily liable, and must indemnify the real estate ... *ibid.*
Whether lands devolve on heir at law or devisee..... *ibid.*
To apply the rule, the mortgage must be the debt of the party..... 457
Although not originally the debt of the party, it is optional in him to make the debt his own, and the general rule will then apply 458

Page
Where it is the debt of the party, mortgagor may exempt his personal estate by express declaration or by implication..... 459
It is a sufficient indication of intention if it satisfy the mind of the judge 460
Evidence *dehors* the will should not be received of the testator's intention ... 461
It is not sufficient to shew an intention to charge the real estate with payment of debts, the mortgagor must shew an intention to exempt the personal estate ... *ibid.*
Distinction taken in the case of a testator directing a particular debt to be paid out of a particular fund ... 462
The personal estate falling to the executor, *virtute officii*, strongest inference against the exemption of personal estate 463
Or the gift of the personal estate to him as a legacy, and his appointment as executor, being in one and the same sentence..... *ibid.*
The converse is not an inference for its exemption..... *ibid.*
Cases to be found of executor taking the personal or residue of personal estate exempt from debts *ibid.*
The same persons appointed trustees and executors, an inference against the exemption 464
A gift of the whole personal estate, favorable to the exemption 465
A bequest of the residue, *secus* *ibid.*
Distinction taken in cases in which the residue has been immediately preceded by an enumeration of specific articles not likely to be intended to be sold..... *ibid.*
Or when considered a residue, specifically bequeathed *ibid.*
And in all cases in which it is a specific legacy 466
Cases in which the possession of the real and personal estate accrues to the same person *ibid.*
Inference against the exemption *ibid.*
Trust for sale out and out, legatee of residue may call on executor taking the residuary general personal estate for indemnity..... *ibid.*
But *secus* if the general fund be given to a stranger..... *ibid.*
Omission to charge funeral expenses in real estate ... 467
Modern cases considered ...467 to 482
General rule in this respect laid down by Lord Eldon... 482

Page
The general rule of primary liability of personal estate to indemnify real estate, will not in the case of mortgage prevail to the prejudice of legatees, creditors, or the paraphernalia of the widow 483
Rule applicable between heir and devisee, and executor or administrator, residuary legatee, and next of kin ... *ibid.*
Will be applicable in case of orphanage part by custom of London, and widow's customary moiety in province of York 483, 484
In what order real estate shall be applied *ibid.*
Devisee of estate in mortgage may call on estate devised for payment of debts, or charged with debts for indemnity, although devised subject to incumbrances ... 485
Estate descended must exonerate mortgaged estate devised 486
So if testator exempt his personal estate, and devise his mortgaged estates subject to incumbrances, and permit other estates to descend 487
Estates devised for payment of debts shall exonerate descended estates..... *ibid.*
This does not apply to estates specifically devised, charged with debts 488

Page
General order of payment 489. 491
Cases of doubt whether the loan is the proper debt of the party 491
In case of a purchaser, mortgage on estate not his debt *ibid.*
Covenant by him with vendor to indemnify him or to pay the debt is not sufficient evidence of intention 492. 494
Exception in a case in which the purchaser had originally become liable to mortgagee 495
Under a covenant with mortgagor to indemnify or pay the debt, purchaser not liable to action at law by mortgagee 492
Trust or charge by purchaser for payment of debts will not comprise it..... *ibid.*
Distinction if money be borrowed to complete the purchase *ibid.*
And further distinction taken between a purchaser of the equity of redemption and a contract for the whole estate discounting the mortgage debt, *qu.?* 493
Cases in which there is a new agreement between the purchaser and mortgagee 495, 496
Qu.? If purchaser merely

Page
covenant with mortgagee to pay the debt 497
Case of heir at law or devisee taking subject to mortgage 498
Covenant on transfer or assignment will not make the debt their own..... 499
Or if other estates be added on loan of a further sum... *ibid.*
Or a covenant for increase of interest..... *ibid.*
Qu.? If the heir or devisee borrow a small additional sum whether it will not form a primary charge on the mortgaged estate *ibid.*
General charge by heir or devisee of debts on real and personal estate will not shift the onus *ibid.*
Nor a direct mortgage by him to pay off debts or legacies of his ancestor, &c. 501
The like if he give his bond or note of hand for debts or legacies charged on the land *ibid.*
The case of surety *ibid.*
Where an estate is charged under a power and in an assignment, the person entitled covenants *ibid.*
Or where a man charges his estate as a mere surety for another's debts *ibid.*
Voluntary gift by way of charge with personal covenant 502

Page
Covenant by settlor for children's portions, widow's jointure..... 502
Husband and wife, case of... *ibid.*
Money raised on wife's estate for benefit of husband, wife will be a creditor 503
Will have preference to legatees but not to creditors ... *ibid.*
Parol evidence admissible to shew for whose benefit money raised *ibid.*
Exceptions if money be raised to pay off debts of wife incurred *dum sola*, &c. *ibid.*
Parol evidence admissible of relinquishment of wife's claim after husband's death 504
Claim of wife not waived by her covenant to pay..... *ibid.*
Husband to be indemnified if on transfer of wife's mortgaged estate he enter into bond or covenant..... *ibid.*
Course to be pursued if the money is intended for husband's benefit 505
Freeholds conveyed with covenant to surrender copyholds, both are primary funds..... 509
Time of payment may be enlarged after decree enrolled 514

POLICY BROKERS.
Vide LIEN.

Have a general lien by usage 311

Page

Poor.

Mortgagor in possession may gain a settlement under the poor laws 331
But not if in possession by fraud or wrong 332
Mortgagee in possession may gain a settlement 354

Portions.

In what manner trusts should be declared of portions ... 136
Case of term limited in remainder after death of parent, and portion made payable at a certain time or age, without reference to the death of parent..... 137
Trust of term to raise portions on failure of issue male of the marriage, and wife dies without issue male..... *ibid.*
Children shall not wait the death of their father *ibid.*
Evils resulting from this doctrine..... 144
Distinctions taken in case a particular time is appointed for raising the portions after the commencement of the term *ibid.*
Or maintenance being directed to be raised out of the rents and profits after the term has fallen into possession..... 145
Or in case the residue of the rents (after raising maintenance) is directed to be paid to the persons entitled in reversion expectant on the term 145
General rule as laid down by Lord Eldon 146
Several cases in which the courts have or have not held themselves bound by the general rule 147 to 162
Usual mode of raising portions..... 163
General rules stated regulating the raising and payment of portions 175
If the portion be to be raised out of annual profits it will carry no interest 176

Possessio Fratris,

May be of an equity of redemption 60

Power.

Vide Notice.

Appointment by way of mortgage is but an exercise, *pro tanto* 59
A power to charge an estate with a sum includes a power to charge interest... 186
An unlimited power to charge will authorize a disposition of the lands..... *ibid.*
A particular power of charging will not authorize a limitation of the land to se-

Page

cure the money, but *qu.?* if equity will not relieve ...187
A power to appoint the fee will authorize a charge ... *ibid.*
As also an appointment to trustees to sell *ibid.*
A power to charge a sum of money held to authorize an appointment of a rent charge *ibid.*
If a mortgage be made under a power, the equity will result to the old uses, unless there be evidence of a different intention 551

PRO CONFESSO.

Bill of foreclosure taken *pro confesso*, court will order a sale 512

PRO INTERESSE SUO.

Proceedings under an examination *pro interesse suo* 596, 597

PURCHASING INCUMBRANCES.

Stranger purchasing in incumbrance for less than full value entitled to whole benefit as against mortgagor 321. 562
Whether as against a *bonâ fide* purchaser without notice or subsequent creditors, *qu.? semble*, he may..... 562
But not if trustee, executor, or guardian or heir at law, unless for protecting an incumbrance in their own right 322. 565
Mortgagee without notice of mesne incumbrances at time of mortgage, purchasing in prior incumbrance, shall tack although purchasing with notice...409, *et seq.*
And although *pendente lite*... 418
Exception if mortgagee purchase as trustee for another 413
And not after a decree to settle priorities 420, 421

PURCHASER.

Vide PAYMENT OF MORTGAGE MONEY.

Mortgagee is a purchaser within 27 Eliz. c. 4. 355
If a man purchase an estate which proves to be subject to an equity of redemption and die, the heir is entitled to money 530
Mortgage existing on purchased estates not considered the proper debt of purchaser 491
Covenant for payment by him with vendor not in general sufficient evidence to make the debt his own 492
Under such a covenant not liable to action at law by mortgagee *ibid.*
Money borrowed to complete the purchase his own debt *ibid.*

Page

Distinction taken in case the contract be for purchase of whole estate discounting the mortgage money 492
Cases of new agreement with mortgagee 495, 496
Qu.? If purchaser merely covenant with mortgagee... 497

QUARRIES.

Mortgagee will not be allowed costs for opening ... 561

RECEIVER.

Mortgagor is not to be considered a receiver for mortgagee 334
Mortgagee may stipulate for appointment of 353. 557
May appoint receiver if estates lie dispersed..... *ibid.*
Mortgagee cannot appoint himself receiver 353. 366
Account kept by receiver within twenty years will not save the right of redemption 544
Appointment of by Court of Equity 595
Mortgagee having legal estate cannot obtain appointment but must eject..... *ibid.*
If first mortgagee be in possession, second mortgagee cannot obtain appointment but must redeem 596
Charge of mismanagement not sufficient ground before answer 596
First mortgagee not in possession, second mortgagee may have a receiver without prejudice *ibid.*
And after receiver appointed, it is contempt in first mortgagee to eject without leave *ibid.*
Court, on application, will permit him to eject or to be examined *pro interesse suo* (which see)
Receiver should enter recognizances with two sureties..... 597
Tenants should attorn to him *ibid.*
If it is intended he should do more than keep down interest, order should express it *ibid.*
Appointed on behalf of several cannot be discharged without consent of all..... 598

RECOGNIZANCE.

Vide STATUTE MERCHANT.

Trust estates of inheritance extendible under 51
Recognizances by the common law, what? 76
Execution may be sued out on them as on a judgment ... *ibid.*
Scire facias necessary to revive them *ibid.*
Must be enrolled within six months... *ibid.*
Bind from the time of inrollment *ibid.*

Page

Recognizances by statute in the nature of a statute staple 82
Difference from staple merchant..... 83
Writ of execution under, is an extent 84
How to be inrolled 87
Should be registered in Middlesex and Yorkshire 90

RECOVERY.

Necessary to bar remainder on estate tail in an equity of redemption 23
By mortgagor does not bar mortgagee.....348. 356
By mortgagor tenant in tail, lets in mortgage.....348. 356
Infant trustee or mortgagee will be ordered to convey by..... 362
By mortgagee, does not prejudice right of redemption 370

RECTORY IMPROPRIATE.

Subject to mortgage like any other species of real estate 237

REDEMPTION, RIGHT OF.
Vide EQUITY OF REDEMPTION.

REDEMPTION, BILL FOR.

One party may be entitled to redeem, although the other may not be able to enforce payment 34
Equity will (if necessary) make terms with mortgagor before it permit him to redeem 535
Mortgagor not permitted to dispute mortgagee's title before he redeems 535
Court will lend its aid to all persons of the profits, and all persons claiming any share in the equity of redemption 536
General principle that no one shall redeem who cannot show title to mortgagor's estate 537
Exception in case assignees, executors, or trustees refuse to act..... *ibid.*
Who may redeem
Heir 538
Devisee *ibid.*
Assignee of mortgage..... *ibid.*
Assignees of bankrupt..... 539
Judgment creditor *ibid.*
Tenant by elegit or statute *ibid.*
Sequestrator..... *ibid.*
The crown, or its grantee *ibid.*
Creditor whose debt subsists in equity only, *semble* ... *ibid.*
Tenant 540
Voluntary grantee *ibid.*
Persons claiming in default of appointment *ibid.*
Dowress *ibid.*
Tenant by curtesy *ibid.*
Jointress *ibid.*
Subsequent mortgagees ... *ibid.*
Tenant for life..... 541
Remainder-man *ibid.*

Page
Reversioner 541
Creditors of husband, in respect of mortgage-term purchased in joint-names of husband and wife..... *ibid.*
Protestant heir *ibid.*
Committee of lunatic *ibid.*
Guardian *ibid.*
After twenty years' abandonment, right will be lost ... 542
Unless saved by
Imprisonment *ibid.*
Coverture..... *ibid.*
Being beyond seas *ibid.*
Or non sane memory..... *ibid.*
In which cases, ten years allowed after disability removed 542
If time once begin to run, subsequent disability does not avail 543
Mortgagor may plead statute of limitations, or demur ... *ibid.*
Other circumstances taking case out of the statute..... *ibid.*
Fraud or oppression *ibid.*
Acknowledgement within twenty years 544
Vide Account. Receiver.
A conveyance by mortgagee, subject to redemption *ibid.*
Surrender to use of will of no operation as an acknowledgement *ibid.*
Devise of the lands as mortgaged estate, or allusion to the mortgage, sufficient ... 545
And so contract for purchase of equity of redemption ... *ibid.*

Page
Parol evidence admissible ... 545
If mortgagee submit to be redeemed *ibid.*
Or mortgagor, &c. remain in possession of part..... *ibid.*
Or if the time be otherwise well accounted for 546
No time will bar a Welch mortgage *ibid.*
Or if there be agreement that the mortgagee shall hold till satisfied *ibid.*
A mere demand by mortgagor not sufficient..... 544
Redemption will be decreed according to priorities ... 551
Remainder-man must give tenant for life, and prior remainder-man an option ... *ibid.*
Creditors should make persons legally entitled parties..... 552
Tenant for life only compelled to keep down the interest *ibid.*
But remainder-man may redeem, and evict him if he will not contribute *ibid.*
Subsequent mortgagees must make the mortgagor, or his heir, a party 553
Mortgagor must give six calendar months' notice..... 554
Unless mortgagee has demanded payment, &c. ... *ibid.*

REDEMPTION, BILL FOR.

Vide REDEMPTION, RIGHT OF.

If mortgagor be not a party to assignment, mortgagee

Page

must be a party to the bill for redemption 320
If bill be dismissed for want of payment, it is equivalent to a foreclosure..... 515
A purchaser *pendente lite* will be bound by it..... *ibid.*
If bill be dismissed for want of prosecution, second bill may be filed..... *ibid.*

RE-ENTRY, RIGHT OF, ON PERFORMANCE OF CONDITION.

Not alienable or devisable, and only reservable to the heir 17

REFERENCE UNDER STATUTE 7 GEO. II.

Vide MORTGAGOR.

REGISTRY.

Vide NOTICE.

Is not notice 383. 387
Difference between English and Irish Registry Acts ... 385
Registered deed does not prevail against unregistered deed with notice 387

RELEASE.

By mortgagor after first decree in foreclosure, tantamount to final order..... 528
Release by tenant in tail binding on remainder-men, after decree to account 522
If release of equity of redemption be set aside, money belongs to the heir, *semble* 531

REMAINDER-MAN.

Remainder-man or reversioner may file their bill for relief against tenant for life, permitting interest to run in arrear 445
And may have relief against his personal representatives *ibid.*
May redeem 541
Must give tenant for life and intermediate remainder-man an option..... 551

RENEWAL.

Mortgagee cannot compel mortgagor to advance money for renewal, without an agreement 354
Lease renewed by mortgagee will be subject to subsisting equity.....127. 370
Costs of renewal may be tacked with interest..... 392
Mortgagee will be allowed the costs on taking account 561

RENT CHARGE.

Extendible 67

RENTS AND PROFITS.

In what cases the words "rents and profits" will authorize a mortgage, or be confined to annual rents 167

Page

Rents and profits in a devise may carry the fee 167
Natural meaning of raising a portion by rents and profits is by yearly rents..... 168
The cases to the contrary are exceptions *ibid.*
As when a time certain is proposed for payment, and the annual rents are not sufficient *ibid.*
Or when the words were "as soon as conveniently could be." *ibid.*
Sed contra if the children had been of tender years 169
As soon as portions could have been raised by the rents, the land is discharged *ibid.*
Where no time is fixed, and the child dies under twenty-one, and unmarried..... *ibid.*
The words "rents and profits," when added or prefixed to more general words, will not restrict the meaning *ibid.*
Court will not, in any case, order a sale if the contrary intention be clear..... *ibid.*
Rents and profits shall mean annual, when followed or attended by other words implying a negative, or placed in opposition to more general words 170
General rules, in respect of... 175
"To set and farm let, and out of the rents pay debts," not sufficient to authorize a sale 188
"By perception of rents and profits, or by leasing or mortgaging the same," the like *ibid.*
Of the effect of the word "advance," as applied to rents 189
Mortgagor in no case bound to account for ...332. 334. 372

REPAIRS.

Duty of mortgagee in possession to keep premises in necessary repair 353
But is not bound to lay out money for any other purpose 354
May tack costs of repairs with interest..... 392
Will be allowed them on taking account 561

RESTS.

Master not to make annual rests, without special order 556

REVERSION.

In the case of a dry reversion, Court will order a sale instead of foreclosure 512
Reversioner may redeem..... 541

REVIVOR, BILL OF.

Does not open decree of foreclosure..... 516

Page

SALE, POWER OF.

Mortgages with power of sale 128
Valid 135
Concurrence of mortgagor cannot be required, although there be an express covenant by him to join *ibid.*

SALE, BILL FOR.

See FORECLOSURE. IRELAND.

In what cases bill may be filed for sale 512
Whether in case the personal estate is deficient, and the heir and executors are before the Court 513
But not in every case of deficient security, *semble*..... *ibid.*
Et qu.? in case of a defective security 514

SATISFACTION.

If a second mortgage (which proves to be usurious) be given to a mortgagee in satisfaction of principal, and arrears of interest, due on first mortgage, *qu.?* if first mortgagee be discharged 440

SEQUESTRATION.

Is a process against the ecclesiastical profits of a beneficed clergyman 91
Is directed to the bishop..... *ibid.*
Explained 91

SEQUESTRATORS.

May redeem 589

SETTLEMENT.

Settlor covenanting for children's portions, &c. charged on land, the land must bear the charge 502
Mortgagee devises the land in strict settlement, money must be settled in like manner, and not divided between tenant for life and remainder-man, *semble* ... 533

SHERIFF.

Vide EXTENT. JUDGMENT. CHATTELS.

SHIP.

Mortgages of 276
In what manner the mortgage should be..... 288, *et seq.*
How to be registered 277
Transfer to be indorsed on certificate..... *ibid.*
On transfer, certificate of registry to be recited in words at length 278. 286
Transfer, or agreement for transfer, must be in writing containing recitals of registry..... 281. 286
Need not recite indorsements 286
If ship at sea, indorsement

Page
to be made within ten days after ship's return 282
If bankruptcy intervene before all the requisites of 34 Geo. 3. are performed, the transfer will be good, unless there has been unreasonable delay 284, 285
Court of equity will grant injunction to prevent an improper indorsement being put on the certificate 285
In what manner the requisites of the statute law are to be complied with 287
If bill of sale be void, mortgagee may maintain action on the covenants..... *ibid.*
There can be no title in a ship by implication of equity *ibid.*
Secus, in case of trusts by acts of law as assignees of bankrupt, &c. 388
And also of mortgages and equitable contracts duly registered..... *ibid.*
If assurance be defective, equity will not relieve..... *ibid.*
Qu.? in case of fraud by vendor preventing a compliance with requisites of the statute. *ibid.*
Declaration of trust will not vitiate the legal effect of a bill of sale *ibid.*
Parol evidence admissible to shew interests of parties, if the requisites of the Act be complied with..... 295
Mortgagee *prima facie* liable to an action for repairs, or stores, *semble* 296, 297
Register alone not sufficient to charge a person as owner 297
Nor bill of sale, without evidence of acceptance by assignee *ibid.*

SIMPLE CONTRACT.

Vide ASSETS.

Executor of mortgagor of chattel real, cannot redeem without payment of simple contract debt 398
But simple contract debt cannot, in general, be tacked 408

SLAVES REGISTRY ACT.

Regulations of 592, *et seq.*

SOLICITORS.

Vide LIEN. NOTICE.

Have a general lien..... 312
May obtain an order to prevent client receiving money recovered 313
Cannot prevent cause coming to a hearing..... *ibid.*
Nor prevent client discontinuing action..... *ibid.*
May take mortgage security for his costs, pending litigation 560

Vide *Account.*

Page

SPECIAL PLEADER.
Vide LIEN.

Has a lien on papers in his his hand, for his costs in that particular account ... 310

SPECIFIC LEGACY.

May be disposed of by executors 178
Et vide *Legatee.*

SPECIFIC PERFORMANCE.
Vide MORTGAGOR.

STAMP DUTY.

What payable on assignment of mortgage..... 323
Et vide *Addenda.*
Should be paid on interest converted by agreement into principal 439

STATUTE MERCHANT and STATUTE STAPLE.

Trust estate of inheritance extendible under..... 51
Statute-merchant created by statute of Acton Burnell... 63
Further extended by 13 Edward I..... 77
Is a bond of record authenticated by the king's seal, and is called a pocket judgment..... 79
The provisions of the statute must be strictly attended to 79
Statute staple created by 27 Edward III..... 80

Page

Is a bond of record acknowledged before the mayor of the staple, &c..... 81
Sheriff, after extent, by statute-staple, must deliver the lands into the hands of the king, and creditor must sue out writ of liberate 81
Difference between statute merchant and statute staple, and recognizances ... 83
Writ of execution under is an extent..... 84
The advantage of a statute over a judgment *ibid.*
Scire facias not requisite..... *ibid.*
Until actual entry conusee has not an assignable interest *ibid.*
Possession must be obtained by ejectment 85
Release by conusee, how it operates..... 84, 85
How the extent must be executed 85
The lands descend to personal representatives..... 86
How they differ from an elegit, in respect of being satisfied *ibid.*
Lands subsequently purchased, bound by *ibid.*
How discharged *ibid.*
By purchase of part of the lands..... *ibid.*
What course to be pursued in case of eviction 87
Satisfaction to be entered

Page
after payment of debts and costs..... 87
How to be enrolled *ibid.*
Should be registered in Middlesex and Yorkshire 90
Form a general lien, and may be tacked by mortgagee 395
Advantage to be obtained from getting in a precedent statute explained ... 415, *et seq.*
Difference in this respect between statute and judgment..... 416
Creditor by statute shall not tack so as to gain preference 421
Satisfied statute may be used by creditor for his protection 430
Although assigned without consideration 431
Equity will not allow a prior incumbrancer to procure a surreptitious release..... *ibid.*
Tenant by statute may redeem..... 539

STOCK.

Mortgages of 299
Stock in the name of a feme covert not reduced into possession by the husband will survive to the wife *ibid.*
May be subject of loan or may be the security for repayment of money 300
Loan of stock lawful 301, *et seq.*

Page
Parties may agree that dividends shall be paid 303
In action on bond for retransfer of stock, lender will be entitled to highest value on day of trial *ibid.*
Immaterial whether stock be transferred or stock sold out and the nett produce paid..... *ibid.*
Agreement lawful that debtor shall tranfer to creditor such a quantity of stock as the debt would have purchased on the day of agreement and pay dividends in mean time *ibid.*
If principal money be not put to hazard and the creditor may obtain an advantage beyond legal interest, the transaction will be tainted with usury 304
As if an option be given to creditor to have stock or money *ibid.*
Agreement valid for retransfer of stock and 5*l.* per cent. on money produced by the sale, *semble* 308
But *qu.?* Whether an agreement for retransfer of stock on a given day, and on default, for payment of money produced by the sales, with dividends in mean time *ibid.*
If stock be a security the

Page

mortgagee, on default, may sell, but must account for surplus 309. 519
Dividends are not apportionable 453
Mortgagee (on bankruptcy of mortgagor) may prove the value of stock at date of commission and the amount of dividends prior to commission 505

SUBPŒNA.

Process by subpœna is a judicial writ returnable in term time..... 525
To be served on infant heir of mortgagor when of age *ibid.*

SURETY.

When an estate is charged under a power and on assignment, the owner covenants for payment, it is not made his debt 501
Case of one charging his estate as surety for another *ibid.*
Voluntary gift by way of charge with personal covenant 502
Covenant by settlor for children's portions or widow's jointure..... *ibid.*

TACKING.

Vide INTEREST.

Of tacking 390
Interest cannot (with notice) be tacked to the prejudice of other creditors having liens 319. 439
Costs of maintaining title, renewal, repairs, permanent improvements, may be tacked with interest and *semble* without mortgagor's concurrence 320. 393

Et vide *Costs.*

First mortgagee, making further advances without notice, will have preference over subsequent registered incumbrances 383
So subsequent incumbrancer getting in the legal estate will have preference over prior registered incumbrances of which he had not notice 383, 384, 385
Creditor without notice having the legal estate entitled to tack all sums forming a specific or general lien on the land 398. 423
But *secus*, if the security could not form a lien as a judgment in respect of copyholds *ibid.*
Mortgage creditor may tack judgment although he has not taken out execution prior to bankruptcy of his debtor 394
Bond cannot be tacked against mortgagor or his creditor or others claiming

Page
under him for a valuable consideration 396. 399
Et vide *Bond.*
Seems to be no difference in this respect between mortgagor coming to redeem, and mortgagee coming to foreclose 398
Not to be tacked against other bond or specialty creditors 399, 400
May be tacked against heir and beneficial devisee but not against devisee for payment of debts..... 398
Nor against assignee of heir, devisee or executor,..... 399
If mortgagor of chattel real die indebted to mortgagee by simple contract, executor must pay both debts... 398
If two estates be mortgaged for separate debts to one person, both must be redeemed or neither.. 400, *et seq.*
The like if one estate be first mortgaged and afterwards other estates for the first sum and further advances, the first estate cannot be redeemed without payment of all..... 406
The transaction must however be between the same parties or those claiming under them *ibid.*
Distinction taken in case the mortgages are made to different persons and afterwards transferred to one... 407
Simple contract debt cannot in general be tacked 408
Mortgagee without notice purchasing in a precedent legal mortgage shall tack although with notice of mesne incumbrance at the time of getting in legal estate 409, *et seq.*
Exception if mortgagee purchase as trustee for another 413
Third mortgagee may buy in first mortgage, *pendente lite* 418
But not after a decree to settle priorities 420, 421
Judgment creditor or by statute or recognizance shall not tack so as to gain preference 421
Creditor may tack after commission of bankruptcy against the mortgagor 426
Advantage of may be lost by fraud..... 427
What amounts to..... *ibid.*
Vide *Fraud. Priority. Title Deeds. Witness.*
Qu.? If mortgage made to secure further advances and second mortgagee lends with notice, whether first mortgagee may tack with notice of second 429

Page

TENANT.
Vide LESSEE. NOTICE.

May redeem 540

TENANT AT WILL.

Mortgagor, tenant at will to mortgagee, when..... 328

TENANT IN COMMON.

Mortgage loan advanced jointly by two or more belongs to them as tenants in common 532
Lands foreclosed by several are held as tenants in common 533

TENANT BY THE CURTESY.

Allowed in equity of redemption 48
May redeem 540

TENANT BY ELEGIT.
Vide JUDGMENT.

May redeem 539

TENANT FOR LIFE.

Must keep down interest 445
Reversioner and remainder may file their bill for relief, if interest in arrear... *ibid.*
And may in equity compel his personal representatives to discharge arrears *ibid.*
Mortgagee permitting tenant for life to run in arrear and purchasing life estate obliged to apply surplus rents in liquidation of arrears 445
Second tenant for life not bound in favor of remainder man to satisfy arrears of interest during life of first tenant for life..... *ibid.*
Distinctions taken in certain cases of arrears during life of jointress of part of the estate 446
And of a charge on an estate in possession of two several tenants for life, the estate of one during his life not being subject to the charge and the rents of the other not being sufficient to pay the interest *ibid.*
Not entitled to any part of principal on payment of mortgage money secured on estates devised by mortgagee in settlement, *semble* 533
May redeem..... 541
Can only be compelled to keep down the interest 552
But remainder man may redeem and compel tenant for life to contribute or give up possession *ibid.*

TENANT FROM YEAR TO YEAR.

In possession at time of mortgage entitled to six months notice to quit 343

Page

TENANT IN TAIL.

Mortgages by 213
Conveyance by, gives a base fee determinable by entry of the issue *ibid.*
Subsequent fine and recovery by mortgagor, although to other uses, will let in the mortgage 213. 231. 348
If the mortgage be in fee, the concurrence of the mortgagee necessary to make a good tenant to the præcipe 214
Mortgagee may compel mortgagor tenant in tail to complete the title 214. 231
Whether the bargain and sale of commissioners of bankrupt will perfect the assurance..... 214..220. 230, 231
Relief in equity against assignees if there be a covenant for further assurance 217. 222. 231, 232
Mortgage not binding on issue if defective 232
Tenant in tail cannot be compelled by remainder-man to keep down interest 446
Exception in case tenant in tail is an infant 447
If tenant in tail of full age keep down the interest, his personal representatives will not be creditors on the estate *ibid.*
And if husband of feme tenant in tail get in the mortgage, he will not be allowed interest during the period of his possession 447
Decree of foreclosure against, is binding, on remainder-man, &c. 522
So a release by him after a decree to account *ibid.*
Expectant on estate for life, is a necessary party to foreclosure *ibid.*

TENANT IN FEE-SIMPLE.

Guardian of, bound to keep down interest on incumbrances 447

TENDER.

To save condition at common law, tender must be made at time and place appointed 13
If no place appointed, then mortgagor bound to seek mortgagee *ibid.*
Whether tender in bank notes will satisfy condition at law 15
Tender might be made at any convenient hour in which it might be counted before sun-set 14
If tied in bags, at peril of mortgagee to mis-count ... 15
If mortgagee accepted counterfeit coin, a good performance of condition *ibid.*
If tender made and refused, or

Page

no person to receive it, mortgagor might enter 16
Distinction in last mentioned case between a sum by way of gift secured on land and a debt 16
To stop payment of interest on mortgage, strict tender on expiration of 6 months' notice requisite 450
But mortgagee must have time to advise on deed of reconveyance 451
Tender must be made personally to mortgagee 452
If a place of payment be named in the deed it is sufficient to make tender there *ibid.*
If no place named, mortgagor may name a reasonable place *ibid.*
Tender will not stop interest if right to redemption be in dispute *ibid.*
Must be made by one interested in the estate, *semble*... 453
Tender made to executors who have not proved, sufficient *ibid.*
Whether tender in bank notes is sufficient *ibid.*

TERM IN LAW.

Vide JUDGMENT.

Considered as one day 68

Page

TIMBER.

Vide LESSEE. NOTICE.

If security be defective, mortgagee may fell timber and sell 354
Account will be decreed 371

TIME.

In matters of foreclosure the calculation is by calendar months 528

TITLE DEEDS.

Vide DEPOSIT. NOTICE.

How far possession of title deeds by mortgagor amounts to fraud 427
Is *primâ facie* evidence of 428

TRADER.

Vide ASSETS.

TRANSITU.

Vide LIEN.

After delivery of part, no stoppage of remainder of goods in transitu 259. 313
Consignee may by indorsement on bill of lading divest right of consignor in transitu 270
As between consignor and consignee right not divested until possession 272
But it is sufficient if a mark be put on them by consignee 275

Page

TRUST.

Devisees in trust to raise money by mortgage or sale, for payment of debts, may proceed without sanction of a court of equity..... 187
Trust to lay out money "on good security" does not authorize a mortgage, *semble* 192
If mortgagor have notice of trust, he is bound to see to application unless specially exempted 193

TRUST ESTATES.

If of inheritance, extendible on a judgment, statute, or recognizance 51. 57
Secus, if of chattel interest ... 52

TRUSTEE.

Purchasing in incumbrances 321. 322
Course to be pursued in loan of money by 532

TRUSTEES FOR SALE.

Trust for sale will in general include a mortgage..... 185
Whether trustees to raise money by sale or mortgage, having raised the money by mortgage, can sell to discharge it..... 186
Mortgagee cannot, in such case, compel a sale..... *ibid.*

Page

TYTHES.

May be mortgaged..... 237

USURY.

Vide STOCK.

Loan at interest deemed usury prior to 37 Henry VIII. cap. 9. 6
Usury by the common law if rents were not applied in discharge of principal..... 6
Agreement at time of mortgage to convert interest into principal, from time to time as it becomes due, tends to usury 438
Mortgage debt composed of principal and interest, and interest on that interest, *qu.* if usurious..... 440
Whether payment of six months' interest in advance on paying off mortgage be not usurious..... 554

VIVUM VADIUM.

Explained 8
Resembles in some respect the Welch mortgage 9
Difference between *ibid.*

VOLUNTARY SETTLEMENT.

Voluntary gift charged on land, with personal covenant of settlor, the land bears the onus..... 502
Voluntary grantee may redeem 540

Page

WARRANT OF ATTORNEY.
Vide JUDGMENT.

WASTE.
Vide REPAIRS.

Mortgagor will be restrained from 342
To prevent waste, mortgagee in possession may pull down ruinous houses and rebuild 354
Mortgagee must not commit waste 371
If he fell timber, an account will be decreed *ibid.*

WELCH MORTGAGE.

Difference between Welch mortgage and the Vivum Vadium 9
Resembles the ancient Mortuum Vadium 9. 207
Redeemable at any time, on payment of principal 207
Was formerly a common mode of mortgage in Ireland *ibid.*
Mortgagee has no remedy to compel redemption or foreclosure *ibid.*
Qu.? Whether he could maintain action of debt on the loan 207. *note.*
If amount of rents be excessive, court will decree an account, notwithstanding an agreement that they shall be in lieu of interest.....207
Qu.? Whether not so in every case *ibid.*
Mortgage in the nature of a Welch mortgage 208
Compared to a tenancy by *elegit*; when the principal and interest are satisfied, the mortgagor may maintain ejectment unless 20 years elapse *ibid.*
Mortgagor has a right to an account..... *ibid.*
Time no bar to redemption 208.546
Recognized in a modern case 209
et vide *Addenda.*
No decree of foreclosure can be obtained on a Welch mortgage 517

WITNESS.

Being witness to a deed is not notice, *semble* 389. 427

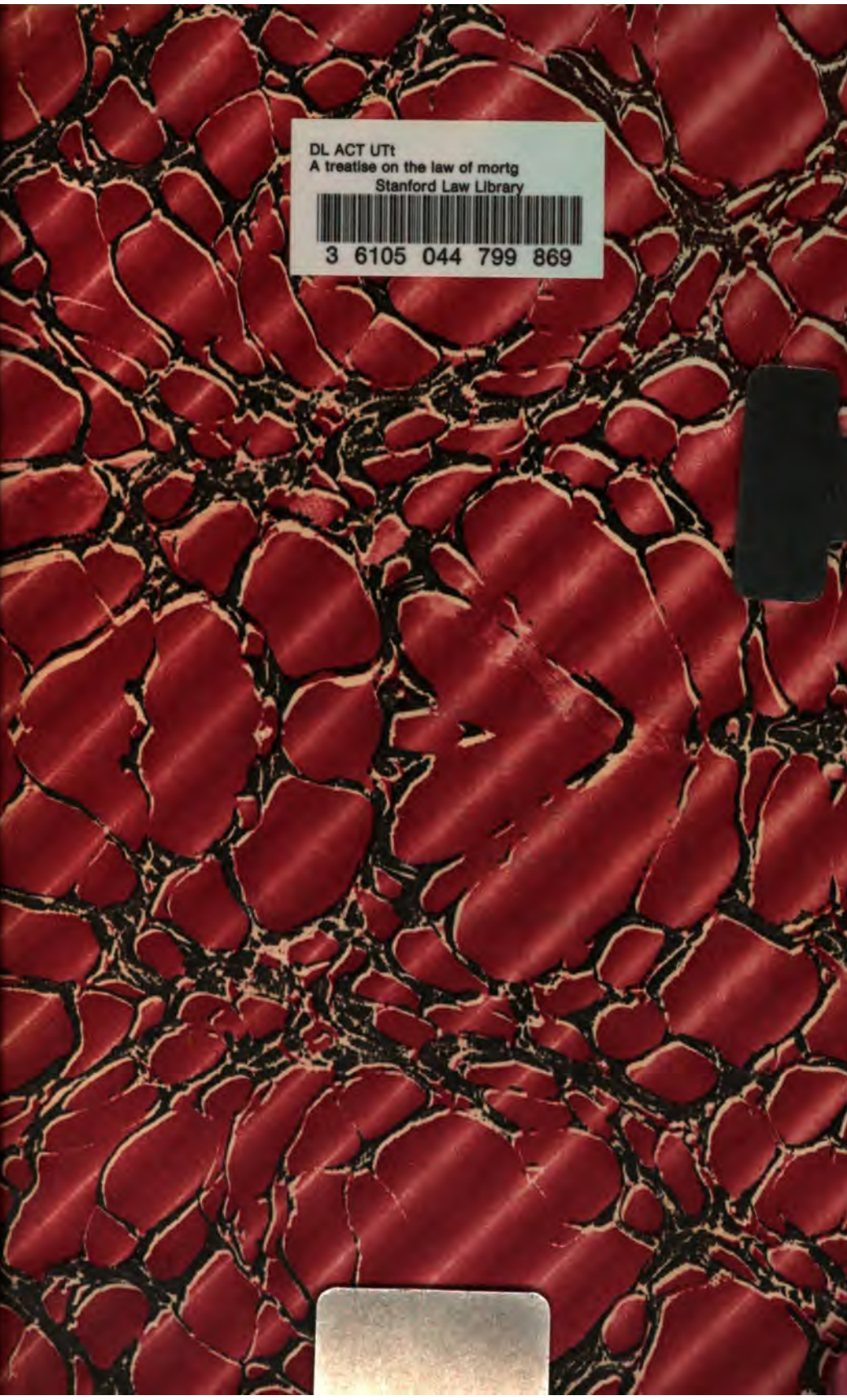
YORK PROVINCE.

General rule, that personal estate of mortgagor shall indemnify the real estate applies as against widow's customary moiety in province of York 484

THE END.

G. WOODFALL, PRINTER, ANGEL COURT, SKINNER STREET, LONDON.




DL ACT UTt
A treatise on the law of mortg
Stanford Law Library
3 6105 044 799 869